Jan 31 1871

Submitted

Mr Justice Clifford

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~181~~ 249

CALEB P. MARSH, PLAINTIFF IN ERROR,

VS.

THE BOARD OF SUPERVISORS OF FULTON COUNTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

~~S~~ P &c

FILED AUGUST 30, 1870.

Feb 14 1871

Affirmed

Mr Field

SUPREME COURT OF THE UNITED STATES.

No. 481.

CALEB P. MARSH, PLAINTIFF IN ERROR,

VS.

THE BOARD OF SUPERVISORS OF FULTON COUNTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Summons	2	1
Declaration	4	2
Judgment	18	6

BILL OF EXCEPTIONS.

	Original.	Print.
Act amendatory of act general assembly State of Illinois	21	7
Act amendatory of act general assembly State of Illinois	25	8
Order of board supervisors Fulton County	27	9
Copy of original bond of Fulton County	31	10
Copy of coupon to original bond Fulton County	33	11
Enumeration of bonds and coupons	33	11
Proceedings of Mississippi and Wabash Railroad Company	34	11
Stipulations adopted by board supervisors Fulton County	38	13
Stipulation	40	14
Another stipulation	46	15
Stipulation, filed June 21, 1869	46	16
Report of finance committee	47	16
Resolution of board of supervisors	48	16
Proceedings of board of supervisors	49	16
List of bonds	51	17
Certificate of clerk county court Fulton County	52	18
Proceedings of board of supervisors	53	18
Deposition of Cline	55	19
Deposition of John H. Piersoll	62	21
Exhibit A, referred to in Piersoll's deposition	66	23
Exhibit B, referred to in Piersoll's deposition	67	23
Deposition of Simeon P. Shope	67	23

	Original.	Print.
Exhibit C, referred to in Shope's deposition	72	24
Deposition of Ingersoll	73	25
Deposition of Mr. Heald	78	26
Deposition of James Thompson	79	27
Deposition of James H. Stipp	82	27
Deposition of Kruger	83	28
Oral testimony of John H. Piersoll	85	28
Joseph Dykes, oral testimony of	86	29
James H. Stipp, oral testimony of	88	29
S. C. Judd, oral testimony of	89	29
Instruction to jury offered by plaintiff	92	31
Writ of error	99	33
Bond of appeal	101	33
Citation	103	34
Certificate	105	35
Assignment of errors	106	35

1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at Springfield, in said district, before the Hon. Samuel H. Treat, district judge of said district, and, in the absence of the Hon David Davis, one of the justices of the Supreme Court of the United States of America, pro tempore sole judge of said circuit court, on Monday, the twenty-fourth day of January, in the January term of said court, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth year.

J. A. JONES, *Clerk.*

CALEB P. MARSH
v.
THE BOARD OF SUPERVISORS OF FULTON County. } In debt.

Caleb P. Marsh, plaintiff, a citizen of the State of New York, puts in his place Messrs. Skinner and Marsh, his attorneys, against The Board of Supervisors of Fulton County, defendant, a municipal corporation, located in said district of Illinois, who puts in its place S. C. Judd, esq., its attorney, in a plea of debt. 2

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the twenty-second day of February, in the year of our Lord one thousand eight hundred and sixty-eight, a summons was issued in said entitled cause out of the office of the said circuit clerk, directed and delivered to the marshal of said district to execute; which said summons, with the return of marshal thereon indorsed, is in the words and figures following, to wit:

Circuit court of the United States of America, southern district of Illinois, ss:

The United States of America to the marshal of the southern district of Illinois, greeting:

We command you that you summon The Board of Supervisors of Fulton County, if it be found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois, at the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of June next, to answer unto Caleb P. Marsh, in a plea of debt, twenty thousand ($20,000) dollars, to his damage, as he alleges, of ten thousand dollars, for the detention of said debt; and have you then and there this writ. 3

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this twenty-second day of February, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the ninety-second year.

[L. S.] J. A. JONES, *Clerk.*

Executed this writ by delivering true copies of the same, one to Samuel P. Cummings, chairman, on the 24 day of March, A. D. 1868, and one to Joseph Dyckes, clerk of the within-named board of supervisors, on the 4th day of March, A. D. 1868.

JOHN LOGAN, *U. S. Marshal,*
Per DAVID J. WAGGONER, *Dep'ty.*

(Indorsed:) Filed April 28, A. D. 1868.

J. A. JONES, *Clerk.*

4 Afterwards, to wit, on the fourteenth day of May, of the year aforesaid, came said plaintiff by his said attorneys, and filed in said clerk's office his declaration in said entitled cause; which said declaration is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *Southern District of Illinois:*

In the circuit court of the United States for the southern district of Illinois, June term, A. D. 1868.

Caleb P. Marsh, who is a resident & citizen of the State of New York, plaintiff, complains of The Board of Supervisors of Fulton County, said county being a municipal corporation and county of said southern district of the State of Illinois, defendant, in a plea of debt:

For that whereas heretofore, to wit, on the first day of September, A. D. 1857, at said county & district, the said county of Fulton, then & there having due authority of law, in such case provided, to make, issue, & negotiate bonds, made its certain bond & obligation, that is to say:

"No. 11. $500.

"UNITED STATES OF AMERICA,
" *State of Illinois, County of Fulton:*

5 "Bond due ten years after date.—Central Division Mississippi and Wabash Railroad Company.

"Know all men by these presents that there is due from the county of Fulton to the Central Division of the Mississippi and Wabash Railroad Company, or bearer, five hundred dollars, lawful money of the United States, with interest at the rate of seven per cent. per annum, payable annually on the first day of July in each year, at the treasury of said county of Fulton, on the presentation and surrender of the annexed coupons; the principal to be due and payable ten years after the date hereof. For the performance of all which the faith of the said county of Fulton is irrevocably pledged, as also the property, revenue, and resources of the said county of Fulton.

"In testimony whereof John H. Peirsol, clerk of the county court, has hereunto subscribed his name, and affixed the common seal of said county court, this 1st day of September, 1857.

[L. S.] "JOHN H. PEIRSOL,
" *Clerk of the County Court.*"

6 And the said county of Fulton then & there, as aforesaid, made its certain other bonds & obligations of the same tenor and effect, words and figures, of the said bond and obligation aforementioned and set forth, except only in the respective numbers thereof, to the number of fourteen of said other bonds and obligations, and which said other bonds and obligations, of the same words and figures as aforesaid except as aforesaid, are numbered respectively as follows: 13, 29, 24, 28, 18, 17, 23, 27, 25, 12, 16, 14, 20, & 19; and then and there issued, negotiated, and delivered the said several mentioned bonds and obligations, and every of them, unto the said payee in the same mentioned aforesaid, and every and all the same then and there issued. And the said plaintiff afterwards, to wit, on the same day and year, became the owner and holder of all the same said bonds and obligations, and the same still owns and holds. And the said county of Fulton, by reason of the premises, became liable to pay to the plaintiff the said several sums of money

in said several bonds and obligations mentioned, according to
7 the tenor and effect of said bonds and obligations, and the same
and each of them long since became due & owing unto the plaintiff, and remains unpaid in any of the same, or any part thereof, nor has the said county of Fulton made any provision for the payment of said bonds and obligations, or any of them, or any part thereof.

2nd. And whereas, also, the said county of Fulton heretofore, to wit, on the first day of September, 1857, at said county and district, then and there having due authority of law to make, issue, and negotiate bonds and interest warrants in such case provided, made its certain instrument in writing and interest warrant, that is to say:

"*Bond No.* 11. *State of Illinois.* $29 17.

"The county of Fulton will pay twenty-nine $\frac{17}{100}$ dollars on this coupon on the first day of July, 1858, at the treasury of said county.

"JOHN H. PEIRSOL,
"*Clerk of the County Court.*"

And the said county of Fulton then and there made, as aforesaid, its certain other instruments in writing and interest warrants of the same tenor and effect, words and figures, of the instrument in
8 writing aforementioned and set forth, except only in the respective numbers of said other instruments in writing and interest warrants, to the number of thirteen; and which said other instruments in writing and interest warrants, of the same words and figures aforesaid except as aforesaid, are numbered respectively as follows: 9, 10, 12, 13, 14, 16, 17, 18, 23, 25, & 27, & 19, 20; and which said several instruments in writing then and there were annexed to certain bonds and obligations of said county of Fulton, by due authority of law in such case provided, made & issued, and payable to the Central Division of the Mississippi and Wabash Railroad Company, (a corporation of the State of Illinois,) or bearer, and were so annexed, for certain interest to accrue thereafter on the moneys in said bonds respectively mentioned, to which they were severally so annexed; and the same several instruments in writing and interest warrants the said county of Fulton did then and there, by due authority of law in such case provided, make, issue, and deliver, together with the said bonds as aforesaid, and the plaintiff is the
9 holder and owner of each and all of said instruments in writing
and interest warrants; by means of which premises the said county of Fulton became liable to pay to the plaintiff the several sums of money in said instruments in writing and interest warrants mentioned, according to the tenor and effect of said several interest warrants, and the same and each of them long since became and are now due and payable from said county of Fulton to said plaintiff, and remain wholly unpaid, and said county of Fulton has made no provision to pay the same or any part thereof.

3d. And whereas, also, the said county of Fulton, heretofore, to wit, on the first day of September, A. D. 1857, at said county and district, by due authority of law in such case provided, made its certain other instrument in writing, and interest warrant, that is to say:

"*Bond No.* 11. *State of Illinois.* $35.

"The county of Fulton will pay thirty-five dollars on this coupon on the first day of July, 1859, at the treasury of said county.

"JOHN H. PEIRSOL,
"*Clerk of the County Court.*"

10 And the said county of Fulton then and there made, as aforesaid, its certain other instruments in writing and interest warrants, of the same tenor and effect, words and figures, of the instrument in writing aforementioned and set forth, except only in the respective numbers of said other instruments in writing and interest warrants, to the number of nineteen; and which said other instruments in writing and interest warrants, of the same words and figures as aforesaid except as aforesaid, are numbered respectively as follows: 1, 5, 7, 12, 13, 14, 16, 17, 18, 23, 25, 26, 27, 30, 29, 28, 24, 19, 20.

And the said county of Fulton then and there made, as aforesaid, its
certain other instruments in writing and interest warrants, to the number of fifteen, of the same tenor and effect, words and figures, of the
instrument in writing above in this count set forth, except only in the
respective numbers of said other instruments in writing and interest
warrants, and in the respective times of payment thereof; and which
said other instruments in writing and interest warrants, of the same
words and figures aforesaid except as aforesaid, are and were each and
all payable on the first day of July, 1860, and are numbered re-
11 spectively as follows: 11, 12, 13, 14, 16, 17, 18, 23, 25, 27, 29, 24,
28, 19, 20.

And the said county of Fulton then and there made its certain other instruments in writing and interest warrants, to the number of fifteen, of the same tenor and effect, words and figures, of the instrument in writing above in this count set forth, except only in the respective numbers of said other instruments in writing and interest warrants, and in the respective times of payment thereof; and which said other instruments in writing, of the same words and figures aforesaid except as aforesaid, were and are each and all payable on the first day of July, 1861, and are numbered respectively as follows: 11, 12, 13, 14, 16, 17, 18, 23, 25, 27, 29, 24, 28, 19, 20.

And the said county of Fulton then and there made its certain other
instruments in writing and interest warrants, to the number of fifteen,
and of the same tenor and effect, words and figures, of the instrument
in writing above in this count set forth, except only in the respective
numbers of said other instruments in writing and interest warrants,
and in the respective times of payment thereof; and which said
12 other instruments in writing and interest warrants, of the same
words and figures aforesaid except as aforesaid, were and are
each and all payable on the first day of July, 1862, and are numbered
respectively as follows: 11, 27, 25, 23, 18, 17, 16, 14, 13, 12, 29, 24, 28,
19, 20.

And the said county of Fulton then and there made its certain other instruments in writing and interest warrants, to the number of fifteen, and of the same tenor and effect, words and figures, of the instrument in writing above in this count set forth, except only in the respective numbers of said other instruments in writing and interest warrants, and in the respective times of payment thereof; and which said other instruments in writing and interest warrants, of the same words and figures aforesaid except as aforesaid, were and are each and all payable on the first day of July, 1863, and are numbered respectively as follows: 11, 12, 13, 14, 16, 18, 23, 25, 27, 24, 29, 28, 17, 19, 20.

And the said county of Fulton then and there made its certain other
instruments in writing and interest warrants, to the number of
13 fifteen, and of the same tenor and effect, words and figures, of
the instrument in writing above in this count set forth, except
only in the respective numbers of said other instruments in writing and

interest warrants, and in the respective times of payment thereof; and which said other instruments in writing and interest warrants, of the same words and figures aforesaid except as aforesaid, were and are each and all payable on the first day of July, 1864, and are respectively numbered as follows: 11, 12, 13, 14, 16, 18, 23, 24, 25, 27, 28, 29, 17, 19, 20.

And the said county of Fulton then and there made its certain other
instruments in writing and interest warrants, to the number of fifteen,
and of the same tenor and effect, words and figures, of the instrument
in writing above in this count set forth, except only in the respective
numbers of said other instruments in writing and interest warrants,
and in the respective times of payment thereof; and which said other
instruments in writing and interest warrants, of the same words and
figures aforesaid except as aforesaid, were and are each and all
14 payable on the first day of July, 1865, and are respectively num-
bered as follows: 11, 12, 13, 14, 16, 18, 23, 24, 25, 27, 28, 29, 17,
19, 20.

And the said county of Fulton then and there made its certain other instruments in writing and interest warrants, to the number of fifteen, and of the same tenor and effect, words and figures, of the instrument in writing above in this count set forth, except only in the respective numbers of said other instruments in writing and interest warrants, and in the respective times of the payment thereof; and which said other instruments in writing and interest warrants, of the same words and figures aforesaid except as aforesaid, were and are each and all payable on the first day of July, 1866, and are respectfully numbered as follows: 11, 12, 13, 14, 16, 18, 23, 24, 25, 27, 28, 29, 17, 19, 20.

And the said county of Fulton then and there made its certain other
instruments in writing and interest warrants, to the number of fifteen,
and of the same tenor and effect, words and figures, of the instru-
15 ment in writing above in this count set forth, except only in the
respective numbers of said other instruments in writing and inter-
est warrants, and in the respective terms of the payment thereof; and
which said other instruments in writing and interest warrants, of the
same words and figures aforesaid except as aforesaid, were and are each
and all payable on the first day of July, 1867, and are respectively
numbered as follows: 11, 12, 13, 14, 16, 18, 23, 24, 25, 27, 28, 29, 17,
19, 20.

And all which said several instruments in writing and interest war-
rants, in this count mentioned, then and there were annexed to certain
bonds and obligations of said county of Fulton, by due authority of law,
in such case made and provided, made and issued, and payable to the
Central Division of the Mississippi and Wabash Railroad Company, (a
corporation of the State of Illinois,) or bearer, and were so annexed, for
certain interest to accrue thereafter on the moneys in said bonds respect-
ively mentioned, to which they were severally so annexed; and the
same several instruments in writing and interest warrants the
16 said county of Fulton did then and there, by due authority of
law in such case provided, make and issue and deliver, together
with the said bonds, as aforesaid, and the plaintiff is the holder and
owner of each and all of said instruments in writing, and interest war-
rants. By means of which said premises the said county of Fulton
then and there became liable to pay to the plaintiff the several sums of
money in said instruments in writing and interest warrants mentioned,
according to the tenor and effect of said several interest warrants, and
the same, and each of them, long since have become due and payable

from said county of Fulton to said plaintiff, and remain wholly unpaid, and said county of Fulton has made no provision to pay the same, or any part thereof.

4th. And whereas, also, the said defendant heretofore, to wit, on the
first day of February, A. D. 1868, at said county of Fulton, in said
southern district of Illinois, was indebted to said plaintiff in the sum of
twenty thousand dollars for money before that time lent and ad-
17 vanced by said plaintiff to said defendant at its request; and in
the sum of twenty thousand dollars for money before that time
had and received by said defendant, to and for the use of said plaintiff; and in the sum of twenty thousand dollars for money found to be due and owing by said defendant to said pl'ff, upon an account then and there stated between them; and in the sum of ten thousand dollars for money before that time due from said def't to said pl'ff, for interest upon and for the forbearance and use of divers large sums of money before then due from the def't to the pl'ff, and by the pl'ff forborne to the deft, at its request, for divers long spaces of time before then elapsed, and to be paid by said def't to said pl'ff, when the said def't should be thereunto afterwards requested.

Whereby, and by reason of the said several sums of money remain-
ing unpaid, an action has accrued to the pl'ff to demand and have of and
from the said def't the sum of twenty thousand dollars; yet the said de-
fendant, although often requested so to do, has not as yet paid the
18 said sum of twenty thousand dollars above demanded, nor any
part thereof, to said pl'ff, but so to do the said defendant has
hitherto wholly refused, and still doth refuse, to the damage of the pl'ff of ten thousand dollars; and therefore he brings suit, &c.

SKINNER & MARSH,
Pl'ff's Att'ys.

(Indorsed:) Filed May 14, 1868.

J. A. JONES, *Clerk.*

Now afterwards, to wit, on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and seventy, the following proceedings were had in said court in said entitled cause, and entered of record, to wit:

CALEB P. MARSH *v.* THE BOARD OF SUPERVISORS OF FULTON County.	In debt.

This day come again the parties by their attorneys, and by agree-
ment, the court assenting, the following order is entered in said
19 cause nunc pro tunc:

And now, on this twenty-fourth day of January, A. D. eighteen hundred and seventy, of the January term of said court, of said year, again come the parties by their attorneys, and the orders of this court heretofore made for trial of this cause by the court, and [the] judgment, by consent, are set aside, [&] the said parties, for trial of the issue joined, put themselves upon the country. And thereupon came the jurors of a jury, to wit, Thomas Wing, James B. Bryce, Aaron W. Mace, R. H. Beach, George P. Strickland, Anthony Steele, John Cunningham, John B. Sage, William M. Council, Finley McNulty, J. R. Herndon, and W. T. Eckert, who, being duly tried, impannelled, and sworn to try the issue joined, after hearing the evidence, arguments of counsel, and having been instructed by the court as to the law, returned into court their verdict, to wit:

"We, the jury, find that the defendant is not indebted to the plaintiff in manner and form as the plaintiff hath in his said declaration
20 alleged."

Thereupon the plaintiff moved the court to set aside said verdict, and for a new trial, which motion the court overruled. Thereupon it is considered by the court that the defendant have judgment upon said verdict and for its costs in this behalf expended, amounting to the sum of ninety dollars and ninety cents; and have execution therefor.

Whereupon, on said twenty-fourth day of January, of the year last aforesaid, came said plaintiff by Messrs. Skinner & Marsh, his attorneys, and filed his bill of exceptions herein; which said bill of exceptions is in the words and figures following, to wit:

21 United States circuit court, southern dist. of Illinois.

CALEB P. MARSH *v.* THE BOARD OF SUPERVSORS OF FULTON County.	Bill of exceptions.

Be it remembered that at the January term of this court, A. D. 1870, and on the 24th day of January, 1870, of said term, the issues joined in this cause came on to be tried before a jury.

The following was the evidence, and all the evidence, offered and given on said trial to the jury by the respective parties:

1st. An act of the general assembly of the State of Illinois, entitled "An act to incorporate the Mississippi and Wabash Railroad Company," in force February 10, 1853, authorizing the incorporation of a company for the construction of a railroad from Warsaw, on the Mississippi River, to the east line of the State. (Private acts of 1853, page 73.)

An act amendatory of said act of 1853, in force February 14, 1857, provides:

22 "§1. That for the purpose of facilitating and more effectually securing the early construction of certain portions of the said Mississippi and Wabash railroad line, the said railroad line, with all the stock, work, subscriptions, franchise, and effects thereunto belonging, are hereby divided and set apart into three divisions, to wit: All that portion of said line, with all the subscriptions, stock, effects, and appurtenances, lying and being west and north of the line of the Northern Cross railroad from Quincy to Galesburg, including the corporate subscriptions of the county of Hancock and city of Warsaw, Illinois, and the city of Keokuk, Iowa, be, and they are hereby, set apart as the Western Division of said railroad; all that portion of said railroad line lying and being, including all the subscriptions, stock, franchise, and effects, within and between the said Northern Cross Railroad line and the Illinois River be, and is hereby, set apart as the Central Division of said railroad; and all that portion of said railroad line lying and being, together with all the subscriptions, stock, franchise, and effects, be-
23 tween the Illinois River and the east line of the State be, and is

hereby, set apart as the Eastern Division of said railroad line; and that each and all of the said divisions aforesaid shall respectively exercise and enjoy all the rights, powers, and privileges authorized and granted to the company by the acts aforesaid, to which this act is amendatory.

"§2. The said divisions shall each be under the management and control of a special board of three commissioners, who shall be elected annually on the first Wednesday of each year by the stockholders of each division respectively; the stockholders, private and corporate, belonging to and within the limits of each division to have one vote, by person or proxy, for each share of stock upon which the instalments then due are paid, a majority of the votes cast being sufficient and competent to elect. And the respective boards of commissioners thus elected for each or either division shall have and exercise all the powers of the original
or whole board of directors of said company upon and pertaining
24 to the contracting, constructing, and completing their respective
divisions of said road, and operating the same; and shall hold their offices until their successors are duly elected and qualified. The commissioners, or a majority of them, heretofore appointed by the board of directors, and now acting upon the Western Division of said road, being hereby authorized to act and have full powers as such until their successors are duly elected and qualified; and all acts and doings heretofore done by them by virtue of their appointment is hereby declared valid and effective.

"§3. The obligations and liabilities of the said railroad company, heretofore created and incurred, shall be equitably and proportionately apportioned to each of the respective divisions, each division to liquidate their just proportion of the same, and each division to be capable of contracting, and be liable and alone responsible for their own debts or obligations contracted; and nothing herein contained is intended or to be construed to invalidate or annul any contract, agreement, or subscription made by or to said railroad company."

25 "§5. The line of the Central Division of said road shall be located and constructed by Canton, in the county of Fulton, and may be extended and terminate at Peoria."

"§7. The stockholders of the Central and Eastern Divisions may hold an election for three commissioners, each for their respective divisions, at any time previous to the annual election hereinbefore provided for, by notice being given in some newspaper published in the town of Canton, in the county of Fulton, for thirty days previous to said election, the said notice to be signed by at least five of the stockholders residing within the Central or Eastern Division, as the case may be, and shall state the time and place of said election to be held for such division; and the commissioners thus elected shall act as such, and hold their offices until their successors shall be duly elected and qualified." (Private law of 1857, page 1053.)

An act amendatory of the aforesaid acts, in force February 24, 1859, which provides as follows:

"§1. That the Mississippi and Wabash Railroad Company, as the same is at present organized, under the provisions of an act entitled 'An act
to incorporate the Mississippi and Wabash Railroad Company,'
26 approved February 10, 1853, is hereby declared to be legally
organized."

"§5. The said company shall have the power to unite or consolidate its railroad with any other railroad now constructed, or which may hereafter be constructed, within this State, on the route of said road or at either terminus of said road, upon such terms as may be mutually agreed upon between the companies so connecting; and for that purpose full power is hereby given to said company to make and execute such contracts with any other company as will secure the objects of such connection; and said company shall not be required to build that portion of said road east of such connection as may be agreed upon, unless a majority of the directors of said company shall be in favor of extending or completing said road east of said connection."

"§ 7. That the board of directors are hereby authorized to make and issue calls for the payment of stock that has been, or may hereafter be, subscribed to the capital stock of the company in such manner, at such
time, and in such localities as may, in the opinion of the board
27 of directors, or a majority thereof, be for the best interests of the
company, or as may be agreed upon between the subscribers and the company."

"§ 10. Any acts or proceedings of the board of directors, or their agents, or other persons authorized so to do, releasing subscriptions to the capital stock of said company, and also any substitution of any other subscription therefor, for any part thereof, or any donation therefor, are hereby legalized and made valid." (Private laws, 1859, page 479.)

An order of board of supervisors of Fulton County, at meeting, June 30, 1853.

Resolution, that the question of the county taking $100,000 of the capital stock of the Mississippi and Wabash Railroad Company be submitted at the next November election, and that, if the vote be for the same, bonds of the county issue therefor, "pledging the faith of the county for the interest and final redemption of the principal thereof."

Meeting of the board, September 16, 1853.

Ordered, that the county subscribe to the stock of the Mississippi and
Wabash Railroad Company, and the Petersburg and Springfield
28 Railroad Company in the amount of $75,000 to each of said com-
panies, and that the question of taking such stock to the amount of $150,000—that is, $75,000 in each of said companies—be submitted to the voters of Fulton County, Illinois, at general election in November next, according to the statute in such case; that bonds be issued for said stock, under the provisions of the statute, payable, one-fouth in 10, one-fourth in 15, one-fourth in 20, and one-fourth in 25 years, bearing seven per cent. interest; provided, the bonds shall not issue until it is certified to the board of supervisors by the secretary of the Mississippi and Wabash Railroad Company that $700,000 stock has been subscribed for and five per cent. paid on the same, and then the bonds to issue to said company as the law contemplates; and upon like certificate that $350,000 had been taken in the Petersburg and Springfield Railroad Company, and five per cent. paid on the same, the bonds to issue to said company as the law contemplates. Rescinds the order of June, 1853, and provides for notices of the election on the question.

Order of said board of April term, 1854.

29 That the clerk of the board subscribe the $75,000 dollars voted
to the Mississippi and Wabash Company, and issue the bonds

when it shall be certified to him by the secretary of said company that $700,000 have been subscribed and five per cent. paid to stock of company.

An order of said board of September 12, 1855.

Resolved, That the clerk of the board be authorized and required to enter on the books of the company of the Miss. and Wab. R. R. Co., in the name of the county of Fulton, the said 75,000 dollars of the stock, and issue the bonds to said company, when it shall be certified by the secretary of said company that 700,000 dollars of stock is subscribed to said road, and five per cent. paid in on the same, as contemplated by order of former board ordering an election, which resulted in the decision of a majority of the voters of Fulton County to take said stock.

An order of said board, meeting March 5, 1857.

Resolution of the board recites that, at the September term of the
board of supervisors, an order was passed directing a vote of the
30 legal voters of the county to be taken for and against the county
subscribing $75,000 to the stock of the Mississippi and Wabash Railroad Company, and the same sum to the stock of the Petersburg and Springfield Railroad Company, which vote resulted in favor of the county taking said stock; and that in said order it was conditioned that no bonds should be issued by the county to the Mississippi and Wabash Railroad Company until it appeared by the certificate of the secretary of said company that the sum of $700,000 was subscribed to the stock thereof, and five per cent. paid thereon; that the same was required of said company when the board [road] extended from Warsaw, in this State, to La Fayette, Indiana; that by a recent act of the general assembly of the State, approved February 14, 1857, dividing the road into three sections, [divisions,] the Western and Central extending from the Mississippi to the Illinois River; that there is now a vigorous effort being made to put the entire Western Division under contract, and thereby greatly increase the prospect of completion of the two sections, [divisions,] while the Eastern Division is abandoned, render-
31 ing the security disproportionate to the extent of the road: Therefore,

Ordered, That the following shall govern the county in subscribing $75,000 on the books of the Central Division of said road: that when evidence shall be presented to the county clerk of this county that 375,000 dollars shall have been subscribed to the stock of said company, within the limits of the Western and Central Divisions of said road, and five per cent. paid thereon, the bonds of the county shall be issued in accordance with the provisions of the original order. Adopted by 13 to 5.

A copy of record of county court showing that, at general election, November, 1853, a majority of votes polled at election were for subscription.

! Bond in manuscript
rd. Page 31

Copy of bond.

"No. 1. $500.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Fulton*:

"Bond due in ten years after date.—Central Division, Mississippi and Wabash Railroad Company.

"Know all men by these presents that there is due from the

32 county of Fulton to the Central Division of the Mississippi and Wabash Railroad Company, or bearer, five hundred dollars, lawful money of the United States, with interest at the rate of seven per cent. per annum, payable annually on the first day of July in each year, at the treasury of said county of Fulton, on the presentation and surrender of the annexed coupons. The principal to be due and payable ten years from the date hereof. For the performance of all which the faith of the said county of Fulton is irrevocably pledged, as also the property, revenue, and resources of said county of Fulton, [as also the property, revenue, and resources of said county of Fulton.]

"In testimony whereof John H. Peirsol, clerk of the county court, has hereunto subscribed his name and affixed the common seal of said county court this 1st day of September, 1857.

[L. S.] "JOHN H. PEIRSOL,
"*Clerk of the County Court.*"

Also nineteen other bonds in all respects like the foregoing, and of each of which the foregoing is a copy, except of the numbers thereof, 33 said nineteen bonds being numbered respectively 3, 4, 5, 7, 11, 12, 13, 14, 16, 17, 18, 19, 20, 23, 24, 25, 27, 28, 29.

Also one coupon annexed to said bond No. 1, of which the following is a copy, viz:

"*Bond No.* 1. *State of Illinois.* $35.

"The county of Fulton will pay thirty-five dollars on this coupon on the first day of July, 1867, at the treasury of said county.

"JOHN H. PEIRSOL,
"*Clerk of the County Court.*"

Also certain other coupons annexed to the aforesaid bonds, and of each of which the foregoing is a copy, except as to amounts and time of payment; and the number, amounts, and times of payment of which said other coupons are as follows:

22 coupons of $29 17 each, payable July 1, 1858.
22 coupons of $35 00 each, payable July 1, 1859.
19 coupons of $35 00 each, payable July 1, 1860.
20 coupons of $35 00 each, payable July 1, 1861.
20 coupons of $35 00 each, payable July 1, 1862.
20 coupons of $35 00 each, payable July 1, 1863.
20 coupons of $35 00 each, payable July 1, 1864.
20 coupons of $35 00 each, payable July 1, 1865.
20 coupons of $35 00 each, payable July 1, 1866.
20 coupons of $35 00 each, payable July 1, 1867.

34 ***Proceedings of the Mississippi and Wabash R. R. Co., and stipulations.***

Meeting of board of directors of said company June, 1855.

Committee of three appointed by board and stockholders to take charge of and construct Western Division of Mississippi and Wabash railroad, being west of the C., B. & Q. railroad, authorizing the raising of money on same, and application of subscriptions on line of same, including Hancock County, and cities of Warsaw and Keokuk, to construction of this division, and making it a separate enterprise, with power to contract and use power of charter for such purpose, but limit-ing the obligation of company to pay debts except from proceeds of subscriptions in the division or earnings of the division, and providing for the final resumption of the entire line by the company on certain contingencies.

Meeting of said board of directors November, 1855.

Business transacted relating to Western Division, and authorizing division indebtedness to amount of $500,000, and division subscriptions to cover same to be applied to such purpose. A committee ap-
35 pointed with power to contract for and construct the road from
Pekin to Canton, Fulton County, and appropriating the subscription of Tazewell, Peoria, and Fulton Counties to such purpose, with same power as committee of the Western Division, and authorizing them to receive payment of such county subscriptions, and demand county bonds in payment.

Meeting of said board of directors June, 1856.

Committee appointed to construct the road from Pekin to Bloomington, with like powers and in like manner as committee appointed for the Western Division, and authorizing proceedings for consolidation with other roads east of Illinois River; and resolution that stock subscribed by "persons" residing in Fulton County should not be collected unless the director residing in said county should desire the same, and the portion of the road lying in said county should be put under contract for construction, provided, within thirty days, offers, to build the road from Canton to the Illinois River, or to Pekin, be made acceptable to the company; then resolution to be of no force.

36 Meeting of said board of directors November 11th, 1858.

Report of agents, or committee of company, relating to portion of road east of Illinois River, made and adopted; and resolution adopted, which recites that the amount of work done on portions of the line of the M. & W. R. R. justifies the company in proceeding to complete the entire line; that by the act of February 14th, 1857, amendatory to the charter of the company, dividing the road into three divisions, providing for the election of three commissioners for each division, and confirming appointments of former commissioners; that J. W. Ingersoll, vice-president of the M. & W. R. R. Co., A. S. Haselton, and W. N. Cline, all of Fulton County, were elected commissioners, who, supposing that they were legally acting, without an acceptance of said amendatory act, (as by a judicial decision appears necessary,) proceeded in July, 1857, to build the portion of the road from Canton, Fulton County, to Bushnell, McDonough County, and contracted with Edgar P. Buell and George Higbee for completion of same between said points; that said commissioners have, under their election and contract, collected from
37 stockholders residing in Fulton and McDonough Counties a
large sum, "including fifteen thousand dollars of the bonds of the county of Fulton in her corporate subscription to said M. & W. R. R. Co.," and given receipts therefor, and secured right of way between said points, &c.:

Recites that commissioners appointed in 1855 for Western Division have completed the road from Warsaw and Keokuk to Carthage, in doing which they have collected corporate and private subscriptions in said division, and receipted for the same:

Recites that the commissioners appointed in 1856 for the Eastern Division have acted as such, and made report of their proceedings, &c.: Therefore,

Resolved, That all acts of said commissioners, Ingersoll, Hazelton, and Cline, of the "Central Division of the M. & W. R. R.," and of the commissioners of the Western Division, and of the commissioners of the Eastern Division of said road, "be, and hereby are, fully confirmed by this board, as the agents of the board, as fully and completely as
if done by the board direct," and their acts are assumed by said
38 board as its agents.

And provides that the debts of each division be paid out of subscriptions, &c., appertaining to same.

Resolved, That the interests of the company require non-acceptance of amendment to charter of February 14th, 1857, and that it be rejected, and that committee for Western Division proceed to put road from Carthage to Bushnell under contract.

Meeting of said board December, 1858.

Resolution for amendment of charter for assumption of control of the whole line of the road by company, and doing away with the divisions of the same, except the Western Division.

Meeting of said board April, 1859.

Resolution recites passage of act of February 24, 1859, repealing act of 1857, and accepts same, and accepts the report of "the late commissioners of the Central Division."

Stipulation that said board of directors—

December, 1853, adopted report that there were private subscriptions in Fulton County exceeding the subscriptions of Ingersoll of $20,000,
Stipp of $20,000, Babcock of $5,000, Babcock of $20,000, Hazel-
39 dine of $5,000, Maple of $20,000, and Roosevelt of $10,000—in all
$100,000; and therefore ordered that these subscriptions be canceled, except $1,000 of Roosevelt's subscription; and that journal of M. & W. R. R. Co. does not show any meeting of the board from June, 1856, to November, 1858; that the question submitted to a vote of Fulton County was for and against taking $75,000 stock in the Mississippi and Wabash Railroad Company, and not in the Central Division thereof, and a like amount in the Petersburg and Springfield R. R. Co.; that in 1855 Fulton County duly subscribed $100,000 to the Peoria and Hannibal R. R. Co., and issued bonds in payment August, 1858; that in April, 1857, Fulton County voted to subscribe another $100,000 to the Peoria and Hannibal R. R. Co., and $100,000 to the Jacksonville and Savanna R. R. Co., and made the subscriptions and issued the bonds accordingly in 1857 and 1859; that, under contracts of said companies, the Chicago, Burlington and Quincy R. R. Co., in 1862, completed a railroad from its road at Yates City to Lewistown, a distance of about 27
miles, and the same since has been operated with roads to Gales-
40 burg, Peoria, Burlington, Chicago, and Quincy, and said com-
pany is now extending the same from Lewistown to Rushville; that Edgar P. Buel, in 1857, and up to 1858, lived in Fulton County, and James M. Thompson has there lived for fifteen years.

That this case is at issue as upon plea of nil debet, or non est factum;

that no question of jurisdiction shall be raised, and no evidence be used for such purpose, jurisdiction of this court being conceded; that this case shall be submitted at present January term, 1869, with right to either party to argue orally, and right in either to file printed abstracts and briefs, and case to be submitted, and judgment rendered at next term of this court; the trial to be treated as a jury trial, with same rights as if jury impanelled, but without jury in fact, and bill of exceptions afterwards to be taken.

January 4, 1869.

Stipulation—

That the legal execution of the bonds and coupons sued on is denied as effectually as by any pleading and oath could be.

Admits that John H. Piersoll, being county clerk and ex-officio
41 clerk of board of supervisors of Fulton County, executed the said bonds and coupons, and affixed the public seal of the county, then in his proper custody, thereto, and the same delivered to the commissioners of the Central Division of the Mississippi and Wabash Railroad Company; but defendant denies that he had any authority to do so.

That the charter of M. & W. Railroad Company, approved February 10, 1853; the act amendatory thereto, approved February 14, 1857; orders of said board of their September session, 1853, and of their September session, 1865; the said bonds and coupons, all being alike except in numbers, &c., may be read in evidence, subject to all exceptions.

It is admitted that an election was held, in pursuance of the order of 1853, at the general election in Fulton County of that year, and the proposition of said order adopted by the voters; that the said M. & W. Company was organized and officered under the charter of 1853, and work done, engineering and grading, on said railroad, and stock subscribed to company prior to 10th June, 1856; that the provisions of said act of 1857 were not formally accepted by the board of di-
42 rectors or at any meeting of the stockholders of said company, but the commissioners of the Central and Western Divisions assumed and exercised the powers conferred by said act with the acquiescence, and without the objection, of said R. R. board until December, 1858; that in April, 1857, the stockholders designated by said act as within the Central Division, without objection by the board or stockholders of said company, elected Ingersoll, Cline, and Haselton commissioners thereof, who elected said Ingersoll their president, and thereafter, until December, 1858, said commissioners exercised the powers granted by said act to said commissioners, obtained from said Mississippi and Wabash R. R. Co. the stock and other books pertaining to said Central Division, received new subscriptions of stock, collected prior and new subscriptions and applied the same to construction of Central Division, entered into a contract with E. P. Buell & Co. to construct the Central Division, who performed grading and furnished materials thereon to value of about $75,000, all of which was done without objection; and that in January, 1858, the stockholders of the
43 Eastern Division elected commissioners; that August 31st, 1857, said Ingersoll, Kline, and Haselton, as such commissioners of said Central Division, presented to said Piersoll, as such clerk, blank bonds of like forms of those sued on, and requested him to execute and deliver them, and said Piersoll, as such clerk, did execute and deliver to them, as such commissioners, the bonds and coupons numbered from

1 to 30, of 500 dollars each, and in the aggregate amounting to 15,000 dollars, among which are those sued on, and said commissioners received them as such commissioners.

That the defendant, Oct. 9, 1857, filed a bill in chancery, in the circuit court of said county, against said Mississippi and Wabash R. R. Co., and said Ingersoll, Cline, and Haselton, as such commissioners of said Central Division, Thompson Maple, treasurer of same, and said Piersoll, clerk aforesaid, to enjoin transfer of said bonds delivered, and the issuing of any more, and to set aside the subscription to said Central Division of the M. & W. R. R. Co. made by said clerk, on which
44 summons and injunction issued; and either party may use the
record of said cause, either of the circuit or Supreme Court, and all parts thereof, to the extent the same is competent and relevant evidence, on trial of this action.

An act amending the charter of said company, and repealing the said act of 1857, passed February 24, 1859, was immediately accepted by said company, and from thence the division commissioners ceased to act. A part of the bonds and coupons so issued were by said commissioners of said Central Division, or their treasurer, delivered to said E. P. Buell & Co., or one James M. Thompson, as payment on their contract aforesaid, before the filing of said bill, numbered 1, 2, 5, 6, 7, 8, and 15, and the others were so paid out to them (Buell or Thompson) shortly after the final decree of said circuit court in said bill; and said record is referred to as to the appeal and proceedings therein. The bonds delivered before filing of said bill do not exceed 3,500 dollars.

The county treasurer of said Fulton county paid the interest on said bonds, 1, 2, 5, 6, 7, 8, and 15, for 1858, and on 15 for 1859. Said
45 bill sought relief on the ground that the charter of said company
had been materially altered, after the vote of the county, by the act of 1857 and the creation of the several divisions; that the condition of the vote had not been complied with by required subscription and payment of five per cent., and therefore the duty to subscribe was discharged, and the bonds fraudulently issued and obtained, and that the order of 1853 and the vote thereunder were void.

Either party may use in evidence the record of said bill so far as competent and relevant, and the same shall correct anything herein, and no admission is made of the relevancy of anything herein contained, and each party retains right to introduce on trial any other proper evidence. No order was ever made in the circuit court, on or after final decree, continuing or reviving said original injunction. Certificates and copies of the record of the Mississippi and Wabash R. R. Co. in the custody of the Toledo, Peoria, and Warsaw Railway Co. may be used in evidence, subject to objections as to competency and relevancy, unless com-
46 pany refuse to give copies to each party if desired.

Another stipulation.

At the general election of 1853, by due order of said board of supervisors, a vote was taken for and against said county subscribing 75,000 dollars to the capital stock of the Mississippi and Wabash R. R. Co., which resulted in a majority for subscription; and afterward, and before the issuing of said bonds, the clerk of said county and board did subscribe said sum, but in what manner, at what time, and to what corporation, is left for proof; and afterward, on the 1st September, 1857, the said clerk executed and delivered the bonds and coupons sued on.

Another stipulation, (filed June 21, 1869.)

It is stipulated and agreed by the parties in this case that the board of supervisors of Fulton County, Illinois, did not, at their session held about the middle of September, 1857, make any formal protest against or objections because of the issuance of the bonds and coupons in controversy in this suit, but that at said session they appointed Asaph Perry agent of said county in reference to all matters between 47 the county aforesaid and the Mississippi and Wabash Railroad Company, including the matter of a vote to take stock in the company; that on the 9th day of October, 1857, said supervisors, through their said agent, filed the bill in chancery referred to in former stipulations, and in other papers in this case, in the circuit court of said Fulton County, Illinois; that at their next meeting after said September session, 1857, some of the members of said board of supervisors had been informed that fifteen thousand dollars in bonds, with coupons attached, had been issued to the Mississippi and Wabash Railroad Company, or else to the Central Division of the Mississippi and Wabash Company, (it is not known which,) about the 1st of September, 1857, and that the matter of such issuance of said bonds and coupons was talked over by some of the supervisors, but by how many, or whether in session of the board or not, is not known.

Report of finance committee of said board of supervisors September 15, 1857.

The assessment roll is 7,157,892 dollars; ordinary expenses of 48 the county, 14,000 dollars; and interest on bonds of county issued and to be issued this year, 9,000, making, including expenses and interest on railroad bonds, 23,000 dollars; and recommending levy of tax for that year of 33 cents on the 100 dollars to meet the same. Adopted by said board.

Resolution of said board, adopted September 16, 1857.

Resolved, That the board proceed to elect agents to represent the interests of the county in the Jacksonville and Savanna, Mississippi and Wabash, and Peoria and Hannibal railroads, one for the first, two for the second, and two for the third, one of agents for the third to represent half the stock west of Spoon River; and the other half east of said river, "whose several duties it shall be to attend all meetings of the stockholders and elections of officers, and do all such things as the several laws of the State relating thereto and the interests of the county require as a stockholder to do." Adopted.

John B. Graham and Asaph Perry on same day elected agents for the county as to Mississippi and Wabash R. R. Co.

49 *Proceedings of said board of—*

March 2, 1858.

Financial agent appointed to manage sinking fund of county on railroad bonds.

March 3, 1858.

Ordered by said board that the agents of the county, as to railroads, report as to all matters relating to their duties as agents the next morning.

March 4, 1858.

Report of railroad agents called for. Mr. Perry, agent for the Mississippi and Wabash railroad, made report to said board, and on motion the same was received.

Claim of John G. Graham for services as county agent as to Mississippi and Wabash R. R. presented to said board, and ordered that same be allowed, and that county warrant issue to him for amount.

Proceedings of said board of—

September 15, 1858.

Committee appointed to report how much money will be required to pay interest for current year on county bonds issued for railroad purposes.

September 16, 1858.

Committee report, among other things, "that 315 dollars will be required to pay interest on 4,500 dollars issued to the Mississippi 50 and Wabash R. R. Company, and disposed of by said company before any injunction writ was served on said company."

John G. Graham excused from "acting as agent for the county for the Mississippi and Wabash Railroad Company," and Michael Gardner elected agent "to fill the vacancy of the resignation of John G. Graham."

Order of said board of September 14, 1859.

Ordered, "That the clerk of county court" issue to Peoria and Hannibal R. R. Co. 95,000 dollars of county bonds, according to proposition submitted to voters of county, on presentation to him of a certain certificate.

And ordered, That county treasurer make arrangements "to pay the interest on the Fulton bonds" "at the places where such interest is made payable by the terms of said bonds."

Order of said board of September 10, 1860.

Ordered, That the county treasurer pay all coupons presented prior to March 15, 1861, and that on first Monday of June, 1861, he purchase, at not exceeding 60 cents on the dollar, as many bonds as the sinking fund will redeem.

51 Also read in evidence the following list of bonds:

Fifteen Mississippi & Wabash Railroad bonds for five hundred each, with coupons attached, for interest on the same, of $35 each, payable from July 1, 1858, to July 1, 1867. Date, Sept. 1, 1859.

No. 1, Mississippi and Wabash Railroad Company, Sept 1, 1857.	$500
2......do......................do......................	500

Another stipulation, (*filed June* 21, 1869.)

It is stipulated and agreed by the parties in this case that the board of supervisors of Fulton County, Illinois, did not, at their session held about the middle of September, 1857, make any formal protest against or objections because of the issuance of the bonds and coupons in controversy in this suit, but that at said session they appointed Asaph Perry agent of said county in reference to all matters between 47 the county aforesaid and the Mississippi and Wabash Railroad Company, including the matter of a vote to take stock in the company; that on the 9th day of October, 1857, said supervisors, through their said agent, filed the bill in chancery referred to in former stipulations, and in other papers in this case, in the circuit court of said Fulton County, Illinois; that at their next meeting after said September session, 1857, some of the members of said board of supervisors had been informed that fifteen thousand dollars in bonds, with coupons attached, had been issued to the Mississippi and Wabash Railroad Company, or else to the Central Division of the Mississippi and Wabash Company, (it is not known which,) about the 1st of September, 1857, and that the matter of such issuance of said bonds and coupons was talked over by some of the supervisors, but by how many, or whether in session of the board or not, is not known.

Report of finance committee of said board of supervisors September 15, 1857.

The assessment roll is 7,157,892 dollars; ordinary expenses of 48 the county, 14,000 dollars; and interest on bonds of county issued and to be issued this year, 9,000, making, including expenses and interest on railroad bonds, 23,000 dollars; and recommending levy of tax for that year of 33 cents on the 100 dollars to meet the same. Adopted by said board.

Resolution of said board, adopted September 16, 1857.

Resolved, That the board proceed to elect agents to represent the interests of the county in the Jacksonville and Savanna, Mississippi and Wabash, and Peoria and Hannibal railroads, one for the first, two for the second, and two for the third, one of agents for the third to represent half the stock west of Spoon River; and the other half east of said river, "whose several duties it shall be to attend all meetings of the stockholders and elections of officers, and do all such things as the several laws of the State relating thereto and the interests of the county require as a stockholder to do." Adopted.

John B. Graham and Asaph Perry on same day elected agents for the county as to Mississippi and Wabash R. R. Co.

49 *Proceedings of said board of—*

March 2, 1858.

Financial agent appointed to manage sinking fund of county on railroad bonds.

March 3, 1858.

Ordered by said board that the agents of the county, as to railroads, report as to all matters relating to their duties as agents the next morning.

March 4, 1858.

Report of railroad agents called for. Mr. Perry, agent for the Mississippi and Wabash railroad, made report to said board, and on motion the same was received.

Claim of John G. Graham for services as county agent as to Mississippi and Wabash R. R. presented to said board, and ordered that same be allowed, and that county warrant issue to him for amount.

Proceedings of said board of—

September 15, 1858.

Committee appointed to report how much money will be required to pay interest for current year on county bonds issued for railroad purposes.

September 16, 1858.

Committee report, among other things, "that 315 dollars will be required to pay interest on 4,500 dollars issued to the Mississippi
50 and Wabash R. R. Company, and disposed of by said company before any injunction writ was served on said company."

John G. Graham excused from "acting as agent for the county for the Mississippi and Wabash Railroad Company," and Michael Gardner elected agent "to fill the vacancy of the resignation of John G. Graham."

Order of said board of September 14, 1859.

Ordered, "That the clerk of county court" issue to Peoria and Hannibal R. R. Co. 95,000 dollars of county bonds, according to proposition submitted to voters of county, on presentation to him of a certain certificate.

And ordered, That county treasurer make arrangements "to pay the interest on the Fulton bonds". "at the places where such interest is made payable by the terms of said bonds."

Order of said board of September 10, 1860.

Ordered, That the county treasurer pay all coupons presented prior to March 15, 1861, and that on first Monday of June, 1861, he purchase, at not exceeding 60 cents on the dollar, as many bonds as the sinking fund will redeem.

51 Also read in evidence the following list of bonds:

Fifteen Mississippi & Wabash Railroad bonds for five hundred each, with coupons attached, for interest on the same, of $35 each, payable from July 1, 1858, to July 1, 1867. Date, Sept. 1, 1859.

No. 1, Mississippi and Wabash Railroad Company, Sept 1, 1857.	$500
2......do....................do..........................	500

No. 3,	Mississippi and Wabash Railroad Company,	Sept. 1, 1857.	$500
4	do	do	500
5	do	do	500
6	do	do	500
7	do	do	500
8	do	do	500
9	do	do	500
10	do	do	500
11	do	do	500
12	do	do	500
13	do	do	500
14	do	do	500
15	do	do	500

Rec'd the above-named bonds.

JNO. W. INGERSOLL,
Pres't Central Division M. & W. R. R. Co.

No. 16,	Mississippi and Wabash Railroad Co.,	Sept. 1, 1857	$500
17	do	do	500
18	do	do	500
19	do	do	500
52 20	do	do	500
21	do	do	500
22	do	do	500
23	do	do	500
24	do	do	500
25	do	do	500
26	do	do	500
27	do	do	500
28	do	do	500
29	do	do	500
30	do	do	500

STATE OF ILLINOIS, *Fulton County*, *ss:*

I, Joseph Dyher, clerk of the county court in and for the county of Fulton and State aforesaid, do hereby certify that the foregoing is a true exemplification of the record of the board of supervisors of the county of Fulton, and State of Illinois, as set forth in the matters and things therein stated relating to the Mississippi and Wabash Railroad Company, as appears of record in my office.

[L. S.] Given under my hand and the seal of said court at Lewistown, the 1st day of September, 1868.

Which said exemplification contained also other matters & things not read in evideenc.

53 *Order at meeting of the board of supervisors September*, 1858.

Resolution disclaiming liability to Mississippi & Wabash Railroad Company, and protesting against amendment to charter of company.

Same meeting. Resolution forbidding clerk from issuing bonds to any railroad company unless so directed by board, and rescinding all previous orders giving such authority. Michael Gardner appointed agent for the county.

Order at meeting of said board December, 1861.

Resolution employing counsel to defend suits on bonds of county issued to Central Division of the Mississippi and Wabash railroad.

Order at meeting February term, 1866.

Order settling two bonds of the county issued to Central Division of the Mississippi & Wabash Railroad Company, at fifty cents on the dollar, and protesting against liability on the bonds.

Proceedings of said board September 13, 1866.

Report of committee of finance in the matter of the Horace P. Perkins bonds, issued to Central Division M. & W. R. R. Co.; that bonds numbered 2 and 6, with interest coupons, of the county of Fulton, issued to the Mississippi and Wabash R. R. Co., were issued and passed
54 into the hands of innocent purchasers for valuable consideration
before any injunction was issued; that interest was paid on said bonds for 1858; that these bonds stand on the same footing as the bonds of the Hon. C. L. Higbee, which were paid for, and they entertain no doubt that said bonds are a value due from the county, and ought to be paid; that the amount due on said bonds is 1,560 dollars; that the holder has surrendered said bonds and coupons, to be delivered as the board shall direct on payment, and recommend payment of same. Report adopted: 15 ayes, 10 nays.

Ordered, That said bonds be delivered to the clerk.

The records of said board show also that a majority of the said finance committee reported against the payment of said bonds and coupons; and that on the morning of the next day, (14th Sept.,) the board of supervisors reconsidered the above vote, and, on final vote, refused to pay said bonds or coupons.

Transcript of records of circuit court of Fulton County in case of County vs. M. & W. R. R. Co. and others, showing decree, April 17, 1858, dissolving injunction and dismissing bill on the hearing;
55 order for appeal on filing bond, and leave to make bill of ex-
ceptions in vacation, April 17, 1858; but no order continuing or reviving the injunction; that the appeal bond was filed on the same day.

Transcript of order of Supreme Court of January, 1859, in Board of Supervisors of Fulton County vs. The Mississippi and Wabash Railroad Company, Ingersoll, Cline, Hazelton, Maple, and Piersol; appeal from Fulton, reversing the decree for error in the record, and nothing more.

Deposition of Cline, taken May 14, 1868.

Resided in Fulton County, Illinois, about 20 years; was for two years secretary of Central Division of Mississippi and Wabash Railroad Company, and afterwards, for five years, president of the Mississippi & Wabash R. R. Co. Said company was organized in the spring of 1853, under act approved February 10, 1853. Prior to February 14, 1857, a portion of the line of the road had been graded, and surveys and estimates had been made to the east line of the State. The object of obtaining the amendment of the charter in 1857, was to facilitate the construc-

56 tion of the said road. Prior to obtaining that amendment, the company
had appointed a board of commissioners to construct the
road between the Northern Cross railroad and the Mississippi. After
the passage of the act of 1857, the line of road was divided into three
divisions: The Eastern, extending from the east line of the State to the
Illinois River; the Central, extending from thence to the Northern Cross
railroad; and the Western, extending from thence to the Mississippi
River. The commissioners appointed, before the passage of the act of
1857, for the Western Division, continued to act afterwards. Prior to
June, 1857, Ingersoll, Hazelton, and myself were elected commissioners
for the Central Division by the stockholders of the Mississippi and Wabash
Railroad Company residing in that division. Ingersoll was also
a member of the board of directors of said M. & W. R. R. Co. Prior to
24 February, 1859, the road from the Mississippi River to Carthage,
about 18 miles, was largely worked, and was in operation by the fall of
1859. Prior to February 24, 1859, the commissioners of the Central
57 Division had contracted for the construction and equipment of
the road from Canton, Fulton County, west about 30 miles. A
very large proportion of the grading had been done, culverts built, and
bridge timbers purchased. The M. &. W. R. R. Company had turned
over to the commissioners of the several divisions the stock subscription
books for stock subscribed within the limits of their several divisions.
Prior to February, 1859, and during the existence of the commissioners,
the board of directors of the M. & W. R. R. Company held meetings
at Chicago, Bushnell, and perhaps other places, and at these meetings
the action of the commissioners was recognized and approved, and
particularly for the Western Division. I never knew of any act of any
officers of the M. & W. R. R. Company in opposition to the commissioners,
and they knew the commissioners were engaged in building the Central
and Western Divisions of the road, and both were in harmony in the
enterprise. Shortly prior to the session of the legislature of 1859, there
was a meeting of the board of directors of the M. & W. R. R. Company
held at Pekin. I was present; was one of the commissioners
58 for the Central Division, and was then by the board instructed
to procure the passage of the amendatory act of February
24, 1859, and accordingly went to the legislature and obtained the passage
of that act. Some time after the passage of the act of 1859, there
was a meeting of the M. &. W. R. R. Company held at Bushnell, and
the board there accepted the act. Soon after the passage of this act,
there was an election of a new board of directors of the M. &. W. R. R.
Company, or a reorganization of the board, and from that time the new
board conducted the affairs of the company, and the commissioners of
the Central Division ceased to act. It was expected the company would
make a running arrangement, from Canton to the Illinois River, with the
Peoria & Hannibal R. R. Company, and thereby avoid building the road
that distance. Fulton County adopted township organization prior to
1853. My impression is the vote of Fulton County, on taking stock in
the M. & W. R. R. Company, was taken in 1853, and it was understood
59 the vote was in favor of the county subscribing $75,000.
In payment of the subscription, bonds of the county were to issue.
The county of Fulton did, by John H. Piersoll, county clerk, subscribe
in a subscription book $75,000 to the stock of the M. & W. R. R. Co.,
or to the Central Division thereof. The subscription was made in 1857,
after the election of commissioners for the Central Division and before
the issuing of any of the county bonds in payment. After the election
or appointment of the commissioners for the several divisions, the com-

missioners proceeded to collect the subscriptions, both private and corporate, from individuals and corporations, in their respective divisions. Hancock County paid her subscription of $100,000; the city of Warsaw, hers of $50,000; and the city of Keokuk paid hers of $100,000. Fulton County paid $15,000 of her subscription, and no more. This $15,000 was paid in the bonds of the county, of $500 each, dated September 1, 1857, bearing 7 per cent. interest, and payable in ten years. The bonds now shown me, numbered 11, 12, 13, 14, 16, 17, 18, 19, 20, 23, 24,
60 25, 27, 28, and 29, I believe to be part of the bonds issued by Fulton County in payment of the county subscription. They were paid on the subscription about 1 September, 1857, to the commissioners of the Central Division; $13,000 of these were paid out by the commissioners of the Central Division to contractors, for work done on the said division of the M. & W. R. R. under their contracts; and $2,000 of them were paid to attorneys of the road in payment of their fees; $3,000 of them were paid to contractors soon after they were received. Afterwards an injunction was served on the M. & W. R. R. Co., and others, against paying out said bonds. Afterwards the injunction was dissolved by the circuit court of Fulton County, and then, on the advice of counsel for the company, the remaining bonds were paid out as before stated. Am acquainted with the signature of John H. Piersoll; have seen him write. The signature to the bonds and coupons, numbered as before stated, and dated September 1, 1857, now before me, is his handwriting, and the bonds bear the seal of the county court of Fulton County.
61 Peirsoll was then clerk of the county court of said county. I have no knowledge where the subscription book now is. It was a small pass book. The M. & W. R. R. Company has been consolidated with the Peoria, Logansport & Toledo railroad, and is now known as the Toledo, Peoria & Warsaw Railway Company, as the consolidated line. The line is built and in operation from the Mississippi to Bushnell, about 60 miles. From thence to the Illinois River the line is now being prepared for the iron its entire extent, and the iron is now being laid down from the Illinois River towards Canton, Fulton County. The entire line will be completed the coming summer or fall. By its construction and consolidation with other lines it makes a continuous line of road from the Mississippi River across the State, equal in length to the line of the original M. & W. R. R., furnishing as great facilities for the people of Fulton County as the M. & W. R. R. could, if built under the original charter. It runs the entire extent of Fulton County from east to west, and that portion of the line from Canton west to Bushnell, about
62 30 miles, is upon the same line and grade as worked by the contractors of the Central Division of the Mississippi & Wabash railroad.

Deposition of John H. Piersoll, taken Sept. 1, 1868.

I was clerk of the county court of Fulton County from the year 1853 to the year 1861. On the first day of September, 1857, I was such clerk. I issued thirty county bonds of said county, of the denomination of $500 each, making in all $15,000, with coupons attached, to the Central Division of the Mississippi & Wabash Railroad Company; said bonds were like the one now shown, numbered eleven, (11.) When I issued said bonds, I supposed I was issuing them under various orders of the board of supervisors of said Fulton County, and said orders are still of record; they were made at sessions of said board prior to the issuing of said bonds. Before I issued said bonds, the secretaries of

the Central and Western Divisions of said Miss. & Wabash R. R. Co. certified to me that the sum of $375,000 of stock had been sub-
63 scribed to the Central and Western Divisions of said R. R. Co. and five per cent. thereof paid in. Before the delivery of said bonds, the secretary of said Miss. and Wab'h R. R. Co. certified to me that $700,000 stock had been subscribed to said R. R. Co., and five per cent. thereof paid in. Said certificates were pasted in the record books of said board of supervisors by myself or my order, and they now remain there, so that they cannot be attached to this deposition. I attach to this deposition copies of said certificates, marked A and B. At the time I supposed the conditions of the orders of the board of supervisors had been complied with when I issued said bonds. The board of supervisors, at their session following, knew that said bonds had been by me issued. Said session was in the same month of September, 1857. It is my understanding that the county treasurer paid some of the coupons on some of said bonds, and was allowed for the same in his settlement with said board of supervisors. (Defendant objected
64 to last clause.) The then county treasurer of said county has departed from this State. It has been, and is, the custom, in the payment of coupons by the county treasurer, that he cancels the same, and brings them in before the committee on finance, or a committee appointed for that purpose, as vouchers in his settlement with the board of supervisors, and said coupons are filed and preserved by the clerk of said board. Said board of supervisors appointed John G. Graham and Asaph Perry agents to represent the interests of said county in said R. R. Co., and I, as clerk, by order of the board, issued to them certificates of their said appointment. Said board of supervisors knew that said railroad was divided into Eastern, Western, and Central Divisions. Said board knew that said bonds were claimed by said Central Division of said R. R. Co. before they were issued. Said board did not protest or object to the issuing of said bonds to said Central Division. I mean to say that said board took no action, they not being then in session. (Defendant objected to that part of above relating to knowledge
65 of the board as to the division of the R. R., and the claim of the Central Division to the bonds, and to protest and objection as to issuing them.) Prior to the issuing of said bonds, I subscribed stock, in the name of the county, $75,000, on the books of the Central Division of the Mississippi and Wabash R. R. Co. The book in which I subscribed said stock was marked "Central Division of the Mississippi and Wabash Railroad Company." My best recollection is, that the subscription run to the said Central Division. I made said subscription by order of the board of supervisors, as I understood the order, being the orders above referred to, and said orders being of record. I do not know whether the board knew that said subscription was made at the time the bonds were issued or not, nor do I remember when said subscription was made, nor do I remember whether there was a session of the board between the time of the issuing the bonds and the making of the subscription. It was talked of in the board, but I cannot remember the time when. I do not remember whether the talk was in the board
66 or by individual members of the board, as it was so long time ago I cannot recollect. This talk was during the session of the board, but whether it was by the board when convened I cannot recollect.

Cross-examined:

Asaph Perry and John G. Graham acted as county agents under the appointment. I do not know of Graham acting but one time. I know that Graham was paid by the county for acting as agent. At the first meeting of the board after the $15,000 of bonds were issued, they took steps to enjoin any further issue of bonds, &c., and they protested against the issuance of the others, and no other bonds were issued upon said subscription. I know of no other subscription of stock on behalf of said county to said Mississippi and Wabash R. R. Co., nor to the Central Division thereof, except that made by myself, as above stated.

Exhibit A, referred to in Piersoll's deposition.

67 This certificate certifies that $375,000 have been subscribed to capital stock of the Central and Western Divisions of Mississippi and Wabash R. R. Co., and five per cent. thereon paid in; dated July 9, 1857; and is signed, M. G. Hunt, sec'y West'n Div'n; W. N. Cline, Cent'l Div'n M. & W. R. R.

Exhibit B, referred to in Piersoll's deposition.

This certificate is dated August 29, 1857; is made by John Gridley, secretary of the Mississippi and Wabash R. R. Co. to the county clerk of Fulton County; and certifies that $700,000 has been subscribed to the capital stock of said company, and five per cent. thereof paid in.

Deposition of Simeon P. Shope, taken Sept. 1, 1868.

Exhibit C is a copy of a page of a book remaining in the treasurer's office of Fulton County, Ill., entitled "Register of railroad bonds," a book kept by the treasurer of said county, in which appears to be kept
a register of the R. R. bonds issued by said county, together with
68 the payment of interest thereon. I made said copy, marked Exhibit C, and have compared the same with the original, and believe it to be a true and corrrect copy thereof. I investigated the payment of coupons on bonds numbered two and six, referred to in said Exhibit C, in February and September, 1866, and found at that time, in the county clerk's office of said county, coupons falling due July, 1858, detached from the bonds, and my recollection is they were canceled. There were also other coupons taken from other bonds appearing to have been issued to said company, and for interest due at the same time; but the numbers of the bonds from which they had been detached, I do not recollect. I have looked for said coupons twice since, both in the treasurer's office and in said clerk's office, and could not find them. Something more than a year ago the safe of said treasurer's office was blown open, and a large amount of canceled bonds and coupons were taken out, as I have been informed. I am satisfied that said coupons referred to by me are lost. I suppose them to be the coupons from a part of the
bonds spoken of by John H. Piersoll in his deposition, and
69 the same bonds which appertain to the subscription spoken of by
said Piersoll. At the February term, 1866, of the board of supervisors of said county, I presented the petition of Horace P. Perkins, asking for payment of two of said bonds and coupons attached; the coupons were for interest falling due July 1, 1859, and subsequent years, up to the time the bonds became due. The coupon for interest falling due July 1, 1858, was detached from each of said bonds, and I found the same in the office of the county clerk; said bonds were Nos. 2 and 6. At said session of said board no action was had on them. At the September session of said board, 1866, the matter was referred to the

committee on finance. I went before said committee; and, they agreeing to report favorably to the payment of said two bonds and the coupons then due in full, I placed in their hands said two bonds, with the coupons attached, to be delivered up to such person, and for such purpose, as the board might direct. Said bonds and coupons were taken by said committee, and, after the board of supervisors concurring 70 in the report of the committee in reference thereto, were presented to the board, when John G. Piper, a member of the board, moved in substance that they be delivered to the clerk to be canceled; which motion was carried. Whereupon the chairman of the committee delivered the said bonds and coupons to Joseph Dykes, clerk of said board. The said board then adjourned until the next day. On the next day the said clerk refused to issue county orders in payment of said bonds, and has ever since refused. I have never seen the bonds since, and, to the best of my knowledge, they remain there now. I gather from general reputation on the subject that said Miss. & Wab. R. R. Co. has become merged in, or consolidated with, other companies, and is called the Toledo, Peoria and Warsaw Railway Company. Said railroad is completed and being operated, I should think, half way through said Fulton County, and the grading and bridging mostly completed the entire balance of the way through the county, and, as I understand, to Bushnell, in McDonough County. I have not been on the line of the road west of Spoon River. What information I have as to the 71 condition of the road west of Spoon River I derive from general rumor and contractors on the said road. When said railroad is completed, it will form a line from Warsaw or Hamilton, on the Mississippi River, to Peoria, on the Illinois River, and there connecting with a line eastward to the State line without change of cars. The gap to be filled up to make said line of R. R. from the Mississippi River to the State line east will not exceed fifteen miles, in my opinion. The said work is progressing. Said railroad traverses the county of Fulton its entire width, a distance of about thirty-five miles or more. I think said railroad is of vast benefit to said county, as it runs through a fine country and extensive coal fields. After said bonds, as before mentioned, were delivered to said clerk, the said board of supervisors adjourned until the next morning, when a member of the board moved a reconsideration of the vote by which the report of the said finance committee, with reference to said bonds and coupons, had been concurred in; which said motion was carried, and thereupon they refused to pay or allow 72 said bonds and coupons.

(All of above testimony by Shope was objected to by defendant.)

Exhibit C, referred to in Shope's deposition.

This exhibit is a table which is headed "Register of railroad bonds, Fulton County, Illinois, issued to Miss. and Wab. R. R. Co., Sept. 1st, 1857;" contains a list of bonds numbered 1 to 30 inclusive, of $500 each, dated Sept. 1, 1857, with columns opposite each number of bond showing the interest for each year, and shows that interest due on said bonds Nos. 1, 2, 5, 6, 7, 8, ($29 17 on each,) July 1, 1858, was paid, and that the interest on said bond No. 15, for the years 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, and also the principal of said bond 15, was paid by said county by order of the board of supervisors at its February term, 1866; total amount paid on said bond 15, $710 00. Opposite bond No. 20 are the following words: "This bond and coupons

(ten in number) surrendered by C. L. Highbee, and canceled, as per
compromise as to this bond and No. 15, per order of supervisors,
73 February term, '66." There is no entry in said table opposite
any other of said bonds.

Depositions, Nov'r 24, 1868.—Ingersoll.

Have lived in Fulton County since 1838. M. & W. R. R. Co. was organized in spring of 1853; was director and vice-president until 1860. Fulton County voted to take $75,000 stock in the company in 1853, and afterwards subscribed the same on the books of the company, or perhaps to Central Division; county subscription by John Piersol, clerk of the board of supervisors; don't know of him making any other subscription. In 1855 or 1856 the board of directors appointed three commissioners in order to facilitate the construction of the western portion of the road with the local means of that portion from the Mississippi to the C., B. & Q. R. R.: one representing the interests of Keokuk, which had subscribed private and corporate subscriptions, about $150,000; one representing Warsaw and Hancock County; and one, the county at large. The commissioners proceeded to have large amount of work done, under authority of their appointment, up to the
74 time of the act of 1857, dividing the road into Eastern, Central,
and Western Divisions. After this I was appointed by the stockholders of the Central Division one of the commissioners for said division, and in connection with Cline and Hazelton, who were the other commissioners appointed by the stockholders, we proceeded to let the work westward from Canton through this division. Under this contract a large portion of the right of way was acquired, and the grading and bridging done between Canton and the C., B. & Q. R. R., and a large amount of ties were delivered. The same commissioners were re-elected in spring of 1858, and during that time the work on the Western Division was progressing, and the road was completed in 1859 from the Mississippi to Carthage, 18 miles. To satisfy the local feeling on the line of the road, and secure the expenditure of subscriptions where made, the directors of the company consented to the several divisions of the line, and I continued to hold the office of director and vice-president of the company while acting as commissioner of the Western
75 Division. The commissioners acted in harmony with the officers
of the M. & W. R. R. Co., and the acts of the commissioners were fully approved by the company, or by the directors. The commissioners received the subscription books of the company for the Central Division, and, I believe, under a resolution of the board of directors, other subscription books were gotten up within the Central Division. By correspondence and verbally, the acts of the commissioners were approved by the directors, and, I think, officially indorsed a meeting of the board in 1858. The officers of the company acted in aid of the commissioners in building the Central Division of the road, and the directors knew of the making of the subscription by Fulton County, and the issuing of the bonds to that division, and acquiesced in them. On the first of September, 1857, the county, by Piersol, its clerk, issued thirty $500 bonds, with coupons, payable to Central Division of M. & W. R. R. Co. They were delivered to me, and by me handed over to Thompson Maple, the treasurer, and immediately thereafter $3,500 of them were paid to E. P. Buel, a contractor, for construction of the road; and the balance were about
76 being paid out, when we were enjoined, and within a day or two
after the dissolution of this injunction by the circuit court the bal-

ance were paid out in good faith to the creditors of the company, and most of them to Buel, the contractor. This railroad has been consolidated with other roads, now known as the Toledo, Peoria and Warsaw Railway Company, now in operation, forming a continuous line from the Mississippi to the east line of the State, and connecting with various railroads to the seaboard. From about one mile west of the Illinois River the road is substantially on the original line of the M. & W. R. R., a distance of about 105 miles, and running the entire distance from east to west through Fulton County, between thirty and thirty-five miles. The consolidation was about three years ago, and the road was in operation through Fulton County in October, 1868. From opposite Pekin to Peoria they run on same track with Illinois River road, and from Peoria eastward the consolidated road runs over what was for-
merly known as the eastern extension of the Peoria & Oquawka
77 road to Logansport, Indiana, and runs about 18 miles north of
Bloomington. When I say the county of Fulton subscribed, I mean that corporations act through official agents, and I suppose Piersol, the county clerk, was the official agent of the county, and he subscribed for and in the name of the county. My impression is that, after the road was divided into divisions, there was no meeting of the board of directors of the company until December, 1858, but there might have been; but there was frequent verbal and written correspondence between the directors and the commissioners. Do not remember whether there was an election of directors in 1857 and 1858. I remember the commencement of the suit by Fulton County. It elicited a great deal of interest, and was subject of much notoriety in the county; do not know of more than one or two suits that created more notoriety. No shares of stock were delivered to Fulton County, to my knowledge. The certificates were not issued until after the suit was commenced, and no one was authorized to receive them, that I know of. The original
route of the M. & W. R. R., as originally contemplated, was about
78 230 miles. The Central Division of the road is 60 or 65 miles.

Deposition of Mr. Heald.

Have resided in Fulton County since 1857. Had no connection with the M. & W. R. R., but kept the books of Maple, the treasurer of Central Division, and of Ingersoll, while he was treasurer. It was in 1857, 1858, and 1859. The Central Division extends from C., B. & Q. R. R. through Fulton County to Illinois River. This division was put under contract in May or June, 1857, by the commissioners. E. P. Buel & Co., the contractors, proceeded with the work west from Canton, and the grading was principally done for 18 miles in 1857 and 1858. Understood from what was going on that the M. & W. R. R. Co. and the commissioners were acting in harmony, but had no personal knowledge. When I first saw the bonds they were in hands of Maple, treasurer of Central Division. A portion were paid to Buel, the contractor. Witness states
same as Ingersoll about consolidation of the M. & W. R. R. with
79 other roads, and construction and operation of same through
Fulton County, and east and west, and the same about the line running north of Bloomington; that the suit of county against railroad company had more notoriety in Fulton County than ordinary suits.

Deposition of James Thompson.

I have resided in Fulton County 22 years. Knew of the suit of county

against M. & W. R. R. Co. and others within a day or two after it was commenced. Knew of the issuance of the bonds. I purchased some 9,000 dollars of them from E. P. Buel, for my hotel property. At time of the sale, and before the injunction suit, received 3,000 dollars of them, numbering between 1 and 8, with coupons. My recollection is, that among the numbers of the bonds taken by me from Buel after the injunction are, 3, 4, 11, 12, 13, 14, 16, 17, 18, 19, 20, 23, 24, 25, 27, 28, and 29. These last bonds were taken by me after the decree of the circuit court dissolving the injunction—on that or the next day. The other
bonds & coupons in controversy (Nos. 1, 5, & 7) I received before
80 the injunction. I know the parties to this suit. I understand
Caleb P. Marsh is the owner of these bonds. I sold them to him some three years ago for 66⅔ cents of the dollars, to be paid me when the money was made on the bonds or collected. I have received no portion of the pay. I sold him, as stated, bonds and coupons. He gave me no notes, but gave an obligation in writing to pay the 66⅔ cents when collected. I delivered the bonds and coupons to his brother, of the firm of Skinner & Marsh, attorneys at law, of Quincy, Illinois, directly after the bargain was made. The bargain was made with said Marsh, who told me he was agent and attorney of his brother. No other person was present. It was understood, at the time of this bargain, they would be sued on in some court. They are the bonds in controversy in this suit. I made no bargain with Caleb P. Marsh personally. He resided in the city of New York. I made no other bargain. I recollect nothing further about it than I have stated substantially. It was understood, at the time of making the bargain, that payment of the bonds would be
resisted. I told Marsh, the attorney, at Quincy, Ill., that the
81 people of Fulton County was willing to pay them, but that there
were a few parties who controlled the county that were not. And I told him at that time that was the reason they were not paid. I also stated that if the question of payment were submitted to the people of the county, they would vote to pay them. There had been some previous talk about the refusal of the county to pay. At the time of the bargain the obligation was signed by the agent of Caleb P. Marsh. I do not know the business of said Caleb P. Marsh. His brother is a lawyer. I do not know whether Caleb P. Marsh was then engaged in buying and selling bonds. There was no understanding to the effect that I was to have any of the bonds back. Since then I have had no communication with the firm of Skinner & Marsh, or either of them, nor taken any part in the prosecution of this suit. I am interested in this suit to the extent of said 66⅔ cents on the dollar, I suppose.

82 *Deposition of James H. Stipp.*

I was one of directors of M. & W. R. R. Co. from 1853 to 1859, at which time I met the directors, and informed them I would never meet with them again. There was a time when the directors thought the road, as an entire line, could not be built; but I don't think the records of the company will show anything about it. Individually, I consider the road, as an entire line, abandoned from July, 1856, and a majority of the stockholders about Canton considered it so; and we turned our attention to the Jacksonville and Savanna road. As to the rest of the stockholders, I do not know. In 1857 an act was passed, dividing the road into divisions, and I think the directors divided it into divisions before the act was passed. The divisions were made by the influence of the stockholders and directors of the different divisions, and

more particularly of the Western. The object was that those interested in the several divisions might use and control the means of their several divisions in their respective divisions to build the road. Have
83 no recollection of a meeting of the board, or of any action as a
board from 1856 to 1859, but heard of one in November, 1858. Know of no election of directors from 1853 until 1859. Heard of the injunction suit in fall of 1857, and think it had more notoriety than ordinary suits. The entire length of the contemplated road was over 200 miles. The Central Division was about 53 miles. The Toledo, Peoria & Warsaw road is in the line of the M. & W. from Canton west to the C., P. & Q. The distance from Pekin to Warsaw is 105 miles. The Toledo, Peoria & Warsaw road substantially accommodates the public from Pekin westward, the same as the M. & W. would have done. Do not know the directors. Knew what the commissioners of the several divisions were doing. Do not think they objected to anything they did. I, as one of them, consented to it.

Deposition of Kruger.

I am vice-president of the Toledo, Peoria & Warsaw railway. The Mississippi & Wabash and this road were consolidated by a vote
84 of the boards and stockholders of the respective companies in
1865, and the consolidated company is now called the Toledo, Peoria & Warsaw Railway Company. The line, as now constructed and operated, is substantially the same from Canton, Fulton County, westward as the line of the old M. & W.; and east of Canton, Fulton County, it is located on the shortest route to the Illinois River, opposite Pekin. From this point, the line runs to Peoria, there connecting with the old Toledo, Peoria & Warsaw; and from thence to the east line of the State, where it connects with lines of road extending to the Atlantic. The entire line from the Mississippi to the State line was opened for business in 1868. The line is fully as good as that contemplated by the old M. & W., and the people of Fulton County, I think, are more benefitted by the consolidated line than they would have been by the M. & W., as it opens to them the market of Peoria. I think the shares of stock in the consolidated line equally valuable as the shares of the M. & W. would have been if built as contemplated. The shareholders of paid stock in the M. & W., on the consolidation, received certificates of
85 full paid stock in the consolidated company; and those holding
partially paid shares were entitled on full payment to like certificates. The county of Fulton is entitled to like certificates in the consolidated company, on payment of its subscription. The length of the line of road of the consolidated company is 228 miles. From Warsaw to opposite Pekin, it is 107 miles. The consolidated line runs 16 miles north of Bloomington through El Paso.

Oral testimony on trial.—John H. Piersol.

Was clerk county court Fulton County from fall 1853 to 1861. My deposition was taken in this case. These are the papers shown me then, (the bonds and coupons.) On settlement with county treasurer by finance committee, county orders are most always burned, and bonds and coupons most generally preserved, I think. I was clerk when Deary was treasurer, and attended meetings of county board, except September term, 1858. I have frequently heard reports of finance committee, but can't say I was always present when reports were

86 made. Do not remember of committee ever making verbal reports. I do not remember whether the question of my issuing the bonds to the Central Division of the Mississippi & Wabash R. R. Company, at the September session, was raised in open board, or whether it was before members of the board. I remember the commencement and pendency of the suit of county against the M. & W. R. R. Co. It was of more than ordinary notoriety. Don't remember a case of similar notoriety. I don't know what became of the subscription book. Don't remember of any certificate of stock issuing to Fulton County, while I was clerk, by the M. &. W. R. R. Co., on the Central Division of the M. & W. R. R. Co. The bonds issued did not pay for the stock voted or subscribed to the Central Division of the M. & W. R. R. Co.

Joseph Dyke's oral testimony.

Have been county clerk of Fulton County since 1861; was member of county board of supervisors from February, 1858 until 1861. Deary was treasurer from December, 1857, to 1861. I was agent of the 87 county in relation to the bonds issued by Piersol, and prosecution of suit of county against the M. & W. R. R. Co. and others. Don't think, while I was a member, any but written reports were made by finance committee in reference to the bonds and coupons in question, or settlements with treasurer. The suit was of more than ordinary notoriety. Don't know of another creating so much; and have been a resident of said county for thirty-one years. Have examined the records of county and did not discover anything from Deary's election to the present time more than is in copy of Record B, as to treasurer's settlements. (It was here admitted that certificates of stock did not issue to Fulton County, and that county did not pay the subscription.) I only knew from what I heard, and by examination of the books of the treasurer's office, that any interest was paid on any of the bonds in question while I was a member of the board. The people of the county were divided on the question of paying the bonds in question. Some localities were in favor and some against paying. When I speak 88 of examining the records, I mean the matters made of record, and not the court files or papers.

James H. Stipp, (oral testimony.)

Was member of county board of supervisors from September, 1861, to February, 1863, and attended all the meetings, and was a member of committee on finance, which settled with treasurer. The committee most generally reported, as to treasurer's account, that they found it correct, and not in writing. The board was composed of 26 persons, and the committee of five. Ingersoll, as a director, was in favor of collecting subscription from county. He was also a commissioner of Central Division. I was not in favor of it, as a director, after 10th of June, 1856. By common report, I learned that interest was paid by the treasurer on some of the bonds in question. The people of the county were divided in regard to paying the bonds in controversy, a majority be opposed to payment.

89 *Oral Testimony of S. C. Judd.*

The interest on the bond purporting to be the bond of Fulton County to the Central Division of the M. & W. R. R. Co., No. 15, for the years

1858 to 1867, was not paid as it became due, but was paid, except for the years 1858 and 1859, by order of the board of supervisors of said county, made at their February term, 1866, and, after said action of the board, together with the principal, in pursuance with a compromise with Judge C. L. Higbee of a pending difference as to that bond and bond No. 20, and their coupons, by which compromise the latter bond and its coupons were delivered up by Judge Higbee, and the county paid bond No. 15 and the coupons unpaid, on the conditions, and under the protests and explanations and disclaimers of any recognition or ratification of any of said bonds to said Central Division of the M. & W. R. R. Co. recited in the resolutions authorizing the compromise. The entries on the book of the treasurer of said Fulton County of those payments on bond 15, as to the principal and interest, (except
90 as to the interest or coupons of 1858 and 1859,) were made in my presence, and after the adoption by the board of supervisors of the resolution to compromise in February, 1866.

The resolutions referred to, and which were read in evidence, recite, among other things, a threatened suit on said bonds 15 and 20, and their coupons, by Judge Higbee, and a pending difference between him and the board as to liability on same, and agree to and provide for the payment of bond 15 and coupons as a compromise of such threatened suit and pending difference, in case and on the condition that Judge Higbee deliver up bond No. 20 and its coupons to be canceled, &c., but expressly deny any and all liability of the county on said bonds issued by the clerk of the board of supervisors to said Central Division of the M. & W. R. R. Co., and disclaim any recognition or ratification of any or either of such bonds.

It was here admitted that the records of the board of supervisors of Fulton County, Illinois, show no action of the board touching the payment of interest on said bonds in controversy, except as otherwise may appear by the foregoing, if otherwise anything does so
91 appear.

The defendant read in evidence (under stipulation) testimony of A. C. Babcock and others, taken in 1858, in the case of The Board of Supervisors of Fulton County vs. The M. &. W. R. R. Co. and others, (reported in 21st Illinois Reports,) tending to show that the bona-fide subscriptions to the capital stock of the Mississippi & Wabash R. R. Co. did not amount to $700,000, and that five per cent. thereon was not paid in up to the time of issuing said bonds and coupons; that the stock of said Central Division of the M. & W. R. R. Co. would be worthless in market or nearly so, but that the stock in the original Mississippi & Wabash R. R. Company, if the road should be completed, would be as valuable as that in other railroads of the State; that after June, 1856, the stockholders of said original company had mostly regarded it as abandoned and dead in and about Canton, where many of them resided.

It was hereupon admitted that suit had, before the present one,
92 been instituted and prosecuted to two unsuccessful issues in the U. S. circuit court for Southern Illinois, on a portion of the coupons of said $15,000 of bonds so issued to said Central Division of the M. & W. R. R. Co., the county appearing and defending; which suit was by one Williams as plaintiff.

There was also evidence tending to prove that the commissioners of the said Central Division of the Mississippi & Wabash Railroad Company acted and made contracts in the name of said Central Division, and for the same.

This was all the evidence.

The plaintiff thereupon requested the court to instruct the jury:

First. That the evidence justified the jury in finding for the plaintiff.

Second. That if the jury believe, from the evidence, that at an election called in A. D. 1853, under an order of the board of supervisors of Fulton County, a majority of the legal voters of said county voted for subscription to the capital stock of "The Mississippi &
93 Wabash Railroad Company," seventy-five thousand dollars, payable in the bonds of said county; that afterwards the Central Division of said company was created, and that the board of supervisors of said county authorized its clerk to make subscription of the same to said division, payable in the bonds of said county, as aforesaid voted; that said clerk did make such subscription, and in payment of the same, under the orders of said board read in evidence, did issue the bonds read in evidence, then the plaintiff is entitled to recover.

Third. That under the evidence the jury should find for the plaintiff.

Fourth. That under the evidence the plaintiff is entitled to recover.

Fifth. That under the evidence the bonds read to the jury are in the hands of the plaintiff valid obligations of the county of Fulton.

Sixth. The statute of Illinois empowered the county of Fulton to issue like bonds and coupons to those read in evidence

94 Seventh. If the bonds and coupons were issued by authority of the board of supervisors of Fulton County, and delivered in payment of a subscription made by authority of said board to capital stock of a railroad being constructed through said county, and were so issued, delivered, and received in good faith, and when no injunction was pending, then they would be valid obligations of said county in the hands of the party to whom so delivered.

Eighth. If the bonds and coupons were issued, delivered, paid, and received, as supposed in the second instruction, and were afterwards, and when no injunction was pending, paid by the party to whom they were so delivered, to Buel & Co., for work done by them in the construction of said railroad, and were by them received for valuable consideration paid, and in good faith, then said bonds and coupons would be the valid obligations of Fulton County in the hands of said Buel & Company.

Ninth. If the bonds and coupons were made, issued, delivered,
95 and received, as is supposed in said second instruction, and were afterwards, and when no injunction was pending, as is supposed in the third instruction, paid to said Buel & Company, and afterwards Buel, or Buel & Company, sold and delivered them to Thompson, and that Thompson received them for a valuable consideration paid and in good faith, then said bonds and coupons would be valid obligations in his hands against Fulton County; and in such case, if the plaintiff is the holder of them, he is entitled to recover.

Tenth. The bonds and coupons are, in legal effect, payable to the holder of them, and, under the orders of the board of supervisors of Fulton County read in evidence, prima facie evidence of a debt to the plaintiff, who offered them in evidence, against said county.

Twelfth. If the $15,000 of bonds were issued under authority of the board of supervisors of Fulton County in payment of a subscription of the county to capital stock of a railroad being built through said

county, made by order of said board, founded on a vote of the
96 legal voters of said county in favor of the subscription, and said county, through said board and agents authorized as such, after the subscription and issuance of the bonds, and by reason of the same, assumed to be a shareholder in the company, and said board appointed agents for the county to represent the county as such stockholder, and attend elections of the company, and meetings of the directors thereof, and that said agents acted as such, made report of their action as such to said board, and were paid for their services by order of said board; and that the county, through said board, after said subscription and issuance of the bonds, levied taxes to pay the interest on some of said bonds, paid interest on portions of said bonds through the county treasurer, and that the county allowed him for such payments; that the county paid for and took up some of said bonds, and through said board adopted a report of a committee of the board that certain of said bonds, held by one Perkins, were a value due from the county, and ought to be paid, and said board so directed, in such case the
97 jury may find that the county ratified the bonds as a debt of the county, and in such case any defect in the election, the subscription, or bonds appearing in evidence would be immaterial.

Which said instructions, and each of them, severally, the court refused to give; but as to each of them severally refused to give the same, either or any of them; to which several and respective rulings and decisions of the court, refusing to give severally the same and respectively, or any of them, the plaintiff at the time of said several decisions, and each of them, excepted to each of them respectively.

But, on the contrary, the court instructed the jury that it appeared from the evidence that the said bonds and interest coupons read in evidence were not the bonds and coupons of the defendants; that they were made and issued by the clerk of the county court of Fulton County without authority; and that their verdict should be for the defendant.

To which several rulings and decisions, severally and respectively, and to each of them severally, the plaintiff at the time the same was respectively done and made excepted.

98 The jury thereupon found a verdict for the defendant, and that the defendant was not indebted to the plaintiff in manner and form as in his declaration is alleged.

The plaintiff thereupon moved the court to set aside said verdict for a new trial, because the said court refused to give severally, and either or any of the said instructions prayed for by plaintiff, and because the court gave the said instructions so given for the defendant; because the verdict is against the evidence, and because the verdict is against the law under the evidence. But the court overruled said motion, to which decision the plaintiff at the time excepted.

And thereupon the court rendered judgment upon said verdict for the defendant, and against the plaintiff for costs of suit, to which decision the plaintiff at the time excepted.

And inasmuch as the several matters aforesaid do not of record appear, the said plaintiff tenders this his bill of exceptions, which is at the same time signed, sealed, & made a part of the record in this cause.

S. H. TREAT. [SEAL.]

(Indorsed:) Filed January 24th, A. D. 1870.

J. A. JONES, *Clerk.*

99 Afterwards, to wit, on the twenty-eighth day of January of the year last aforesaid, a writ of error was issued in said entitled cause out of the clerk's office of said court in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the circuit court before you, between Caleb P. Marsh, plaintiff, and The Board of Supervisors of Fulton County, defendant in error, a manifest error hath happened, to the great damage of the said Caleb P. Marsh, as by his complaint appears; we, being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then,
100 under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of the next term thereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth.

[SEAL.]

J. A. JONES,
Clerk of the Circuit Court of the U. S.
for the Southern District of Illinois.

101 And afterwards, to wit, on the twenty-eighth day of January of the year last aforesaid, came again said plaintiff by his attorneys, and filed in said clerk's office his appeal bond in the words and figures following, to wit:

Supreme Court of the United States.

CALEB P. MARSH
vs.
THE BOARD OF SUPERVISORS OF FULTON County.
} In error.

Know all men by these presents that Caleb P. Marsh, of the city of New York, in the State of New York, and Onias C. Skinner and William Marsh, of the county of Adams, State of Illinois, are held and firmly bound unto the above-named The Board of Supervisors of Fulton County in the sum of one thousand dollars, to be paid to the said The Board of Supervisors of Fulton County or its successors; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our heirs, executors, and administra-
102 tors, firmly by these presents, sealed with our seals, and dated this 24th day of January, A. D. 1870.

Whereas the above-named Caleb P. Marsh has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named Caleb P. Marsh shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ONIAS C. SKINNER. [SEAL.]
WILLIAM MARSH. [SEAL.]
CALEB P. MARSH. [SEAL.]

Sealed and delivered in the presence of—

Approved:

S. H. TREAT, *Dist. Judge.*

(Indorsed:) Filed January 28th, 1870.

J. A. JONES, *Clerk.*

103 And afterwards, to wit, on said twenty-eighth day of January, of the year last aforesaid, a citation was issued in said entitled cause; which said citation is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

To The Board of Supervisors of Fulton County, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of the next term thereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein Caleb P. Marsh is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not to be done to the parties in that behalf.

104 Witness Samuel H. Treat, district judge of the United States for the southern district of Illinois, and one of the judges of the circuit court of the United States for said district, this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth.

S. H. TREAT.

And afterwards, to wit, on the eighth day of August, of the year last aforesaid, said writ of citation was returned by marshal of said district, indorsed in the words and figures following, to wit:

"Executed by reading and delivering a true copy of the within notice to S. Corning Judd, the defendant's attorney, this 4th day of August, 1870.

"JOHN L. ROUTT,
"*U. S. Marshal Southern District of Illinois,*
"By D. J. WAGGONER,
"*Deputy U. S. M.*"

(Indorsed:) Filed August 8th, 1870.

J. A. JONES, *Clerk.*

105 UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, J. A. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing 104 pages contain a full, true, and complete transcript of the process issued, papers filed, and proceedings thereon had, in a certain cause wherein Caleb P. Marsh is plaintiff and The Board of Supervisors of Fulton County, defendant, as fully, truly, and completely as the same appear of file and of record in my said office.

In witness whereof I have hereunto set my hand and official seal at Springfield, in said district, this eighth day of August, in the year of our Lord one thousand eight hundred and seventy, and of our indepen'ce the ninety-fifth.

[SEAL.] J. A. JONES, *Clerk.*

[Five-cent internal revenue stamp affixed and canceled.]

106 *Assignment of errors.*

And now comes the said pl'ff in error by O. H. Browning & O. C. Skinner, his attorneys, & enters his appearance in said writ of error in said Supreme Court, and avers that in the record, proceedings, and judgment of the said circuit court, as in & by the same record, proceedings, & judgment foregoing doth appear, there is manifest error to the injury of said pl'ff in error; and, for assignment of said errors here, said pl'ff in error alleges & shows the following:

First. The said circuit court erred in refusing to give to the jury the several & respective instructions asked for by this pl'ff in error, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, & 12, and each of them.

Second. The said circuit court erred in instructing the jury "that it appeared from the evidence that the said bonds and interest coupons read in evidence were not the bonds & interest coupons of the defendant; that they were made and issued by the county clerk of Fulton County without authority; & that their verdict should be for the defendant."

Third. The said court erred in instructing the jury "that their verdict should be for the defendant."

Whereupon the said pl'ff in error prays that the said record, proceedings, & judgment be reviewed and in all things aforesaid reversed, & for his costs, and for such order of this honorable court upon and touching the same as by the law he may have in the premises.

CALEB P. MARSH,
By O. H. BROWNING & O. C. SKINNER,
His Attorneys.

(Indorsement on cover:) No. 481. Caleb P. Marsh, plaintiff in error, vs. The Board of Supervisors of Fulton County. S. Illinois C. C. U. S. Filed 30th August, 1870.

○

SUPREME COURT
OF THE UNITED STATES.

No. 481.

CALEB P. MARSH,

vs.

THE BOARD OF SUPERVISORS OF FULTON COUNTY, ILL.

Error to the Circuit Court of the United States, for the Southern District of Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

O. H. BROWNING, and
O. C. SKINNER, for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

DECEMBER TERM, 1870.

CALEB P. MARSH,
vs. } Of Fulton County.
The Board of Supervisors,

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

The action below was debt on certain bonds and interest coupons of the same, of the county of Fulton, Illinois, payable to the Central Division of the Mississippi and Wabash Railroad Company, *or bearer*, the coupons being payable to *the holder* simply. The declaration contains special counts on the instruments and the common counts under which latter they were admissible in evidence. The issue was formed by stipulation giving defendant the benefit thereunder of all legal defense. Record, page 40.

The case was tried by jury, and the court in effect instructed them to find for the defendant. Record, page 97.

Verdict accordingly, and judgment against plaintiff.

The following are the laws of Illinois authorizing the county bonds:—

AN ACT supplemental to an act entitled "An act to provide for a general system of Railroad incorporations."

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That whenever the citizens of any city or county in this State are desirous that said city or county should subscribe for stock in any railroad company already organized or incorporated, or hereafter to be organized or incorporated under any law of this State, such city or county may, and are hereby, authorized to purchase or subscribe for shares of the capital stock in any such company, in any sum not exceeding one hundred thousand dollars for each of such cities or counties; and the stock so subscribed for or purchased, shall be under the control of the county court of the county or common council of the city making such subscription or purchase, in all respects as stock owned by individuals.

§ 2. That for the payment of said stock, the judges of the county court of the county, or the common council of the city making such subscription or purchase, are hereby authorized to borrow money at a rate not exceeding ten per cent. per annum, and to pledge the faith of the county or city for the annual payment of the interest, and the ultimate redemption of the principal, or if the said judges or common council should deem it most advisable, they are hereby authorized to pay for such subscription or purchase in bonds of the city or county, making such subscription to be drawn for that purchase, in sums not less than fifty dollars, bearing interest not exceeding ten per centum per annum: *Provided,* that no bond shall be paid out at a rate less than par value.

§ 3. The railroad companies already organized or incorporated, or hereafter to be organized or incorporated under the laws of this state, are hereby authorized to receive the bonds of any county or city becoming subscribers to the capital stock of such company, at par, and in lieu of cash, and to issue their bonds, bearing interest not exceeding ten per centum per annum for any moneys by them borrowed for the construction for their railroad and fixtures, or for the purchase of engines and cars, and for such purpose may dispose of any bonds by them received as aforesaid.

§ 4. No subscription shall be made, or purchase or bond issued, by any county or city under the provisions of this act, whereby any debt shall be created by said judges of the county court of any county, or by the common council of any city, to pay any such subscription, unless a majority of the qualified voters of such county or city, (taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription under this act for county officers,) shall vote for the same; and the judges of the county court of any county or the common council of any city, desiring to take stock as aforesaid, shall give at least thirty days' notice, in the same manner as notices are given for election of state or county officers in said counties, requiring said electors of said counties or said cities to vote upon the day named in such notices, at their usual place of voting, for or against the subscription for said capital stock which they may propose to make, and said notices shall specify the company in which stock is proposed to be subscribed, the amount which it is proposed to take, and the time which the bonds proposed to be issued are to run, and the interest which said bonds are to bear; or in case it is proposed to borrow money to pay such subscription, then the notices shall state the terms upon which such loan is to be effected; and the opinion of the electors shall be expressed upon their ballots "for subscription," or "against subscription," and counted and returned by the judges and clerks of elections as in other cases, and if a majority of the voters of said county or city, assuming the standard aforesaid, shall be in favor of the same, such authorized subscription or purchase, or any part thereof, shall then be made by said judges or common council. In case any election had under this act is held upon a day of a general election, then the number of votes thrown at such general election for county officers shall be the standard of the number of qualified voters as aforesaid. No bonds shall be issued under the provisions of this act by any county or city, excepting for the amounts required to be paid at the time of subscription, and for the amounts of and at the time when assessments upon all the stockholders of said company shall be regularly assessed and made payable.

§ 5. This act shall take effect from and after its passage.

Approved November 5, 1849.

Laws of Illinois, Second Session, 1849, pages 33, 34 and 35.

AN ACT to facilitate the construction of railroads.

SECTION. 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That any city or county in this state which, under the provisions of an act entitled "An act supplemental to an act entitled 'an act to provide for a general system of railroad incorporations,' approved November 5th, 1849," has heretofore subscribed, or may hereafter subscribe for stock in any railroad company, payable in the bonds of said city or county it shall be lawful for the city council of such city, or the judges of such county, and they are hereby authorized and empowered, to issue and deliver to such railroad company the whole or any portion of the bonds of such city or county, payable on such subscription, at any time hereafter, when in their opinion the interest of such city or county will be promoted thereby, whether the assessments upon the stockholders of said company have been regularly assessed and made payable or not.

§ 2. That this act shall take effect and be in force from and after its passage.

Approved March 1st, 1854.

Laws of Illinois, 1854, page 11.

The Mississippi and Wabash Railroad Company was chartered by the State of Illinois, February 10, 1853, and empowered to construct a railroad from Warsaw, on the Mississippi river, to the east line of the State, and was duly organized in the spring of 1853. Record, page 21; record, page 55; record, page 73.

Fulton county adopted township organization *prior* to 1853. Record, page 58.

By which the powers of the county under the foregoing laws were transferred to the Board of Supervisors of the county. Gross' Statutes, 1868, page 751, § 4; ibid, page 752, § 6, division 8; Clarke vs. Hancock county, 27th Illinois, 305; Schenck vs. Marshall county, 5th Wallace, 772.

September 16, 1853, the Board of Supervisors ordered an election upon the question of the county subscribing 75,000 dollars to the capital stock of the Mississippi and Wabash Railroad Company, and a like sum to the capital stock of the Petersburg and Springfield Railroad Company, payable in the bonds of the county, and provided that the bonds should not issue to the former company until its secretary should certify that 700,000 dollars had been subscribed to its capital stock, and five per cent. had been paid thereon. The election to be held at the general state election following. Record, page 28.

The vote was taken at said general election, and a majority of the votes of the county was cast for the subscriptions. See orders of

Board of Sept., 1855, and March, 1857. Record, pages 29 and 30. record, page 41; record, page 59; record, page 73, and record of vote, record, page 31.

In April, 1854, the Board ordered "that THE CLERK of the Board subscribe the 75,000 dollars voted to the Mississippi and Wabash (R. R.) Company, AND ISSUE THE BONDS when it shall be certified to him by the secretary of said company that 700,000 dollars have been subscribed, and five per cent paid to the stock of the company. Record, page 29.

The clerk of the county court was ex-officio clerk of the Board of Supervisors. Laws of Illinois, 1851, page 52, § 8; Gross' Statutes, page 753, §10.

September 1855, the Board again by order required ITS CLERK "to enter on the books of the Mississippi and Wabash R. R. Company *in the name of the county of Fulton*, the said 75,000 dollars of the stock, and ISSUE THE BONDS to said company," upon making the certificate mentioned in the order of April, 1854, and recited that an election had been held upon the same, "which resulted in the decision of a MAJORITY OF THE VOTERS of Fulton county to take said stock."

Prior to 1857, some work had been done in the way of constructing the said road. Record, page 41; record, page 55.

The railroad company had divided the line of road into divisions, and attempted to construct the several divisions from subscriptions obtained in such divisions respectively. See proceedings of board of directors of the company. Record, pages 34 and 35; record, pages 56 and 73.

February 14, 1857, an act amendatory of the charter of the company was passed, which recites: "That for the purpose of FACILITATING and MORE EFFECUTALLY SECURING the early construction of certain portions of the Mississippi and Wabash Railroad line," the act is passed, and dividing the line of road into three divisions,—the Western, the Central, (including Fulton county), and the Eastern—to be severally managed in the construction of the road by commissioners to be elected by the stockholders, or those in immediate interest in the respective divisions, and substantially appropriating the means raised in the respective divisions to construction of the road in such division, and ratifying the appointment and official acts of the then acting commissioners. Record, pages 22, 23, 24 and 25. The proof is that this act was obtained "*to facilitate the construction of the road*," and that the legal sanction of the act was but an aid of the plan adopted by the company with the participation and concurrence of all in immediate interest, the better to forward the enterprise. Record, pages 55, 56; record, pages, 73, 74.

The act also provided, that the Central Division should be constructed by Canton *in Fulton county*, and might extend to Peoria, and expressly provided, that "nothing herein contained *is intended or to be construed to invalidate or annul any contract, agreement, or subscription made by or to said railroad company*." See §§ 3 and 5, record, pages 24, 25.

Afterward, March 5, 1857, the Board of Supervisors passed an order reciting that an order for an election had resulted in a vote of the county to take 75,000 dollars stock in the *Mississippi and Wabash* Railroad Company, reciting the condition of the order, that the bonds should not issue until the certificate of the secretary, mentioned in the former order, should be made, reciting that the condition was made when the road extended from Warsaw, Illinois, to LaFayette, Indiana, reciting that the act of the General Assembly of February 14, 1857, had divided the road into three divisions,—*the Western, Central*, and the *Eastern*,—"rendering the *security* disproportionate to the *extent* of the road," reciting that there was then "a vigorous effort being made to put the entire *Western Division* under contract, and thereby greatly increase the prospect of completion of the two divisions,"—(the *Western* and *Central*)—and "therefore ordered that the following shall govern the county in subscribing 75,000 dollars on the books of the *Central Division* of said road; that when evidence shall be presented to the *County Clerk* of this county that 375,000 dollars shall have been subscribed to the stock of said company, within the limits of the *Western and Central Divisions* of said road, "and five per cent. paid thereon, *the bonds of the county shall be issued.*"

In April, 1857, the commissioners for the *Central Division* were elected by the stockholders, and from thence until 1859 acted in the construction of that division with the *knowledge, aid and sanction* of the Mississippi and Wabash Railroad Company, received from the company the subscription book relating to that division, obtained new subscription and applied the proceeds to construction of that division, and with the commissioners of the other divisions, expended a large amount of money in building the line of road, and all was done with the *knowledge and concurrence* of the Board of Supervisors and people of the county. And all was done in perfect *good faith* among all parties. Record, page 42; record, pages 56, 57, 58 and 59; record page 64; record, pages 73, 74, 75 and 76; record, pages 62, 63, 64 and 65.

The county clerk then made the formal subscription of the 75,000 dollars *in the name of the county*, on the books of the Central Division of the Mississippi and Wabash Railroad Company, and afterwards, September 1, 1857, and upon presentation to him of ALL certificates required by the several orders of the Board of Supervisors, issued the 15,000 dollars of bonds according to the terms of the subscription, and delivered them in payment of the subscription to the commissioners of the said Central Division, and took their receipt for the same, entered in the *records* of the Board of Supervisors an abstract of the bonds, and pasted the receipt thereto. And the bonds were paid out by the company for work done on the Central Division. Record, page 46; record, page 59; record, pages 62, 63, 64 and 65; record, pages 73, 75 and 76; record, pages 51, 52 and 53.

February 24, 1859, the General Assembly by the procurement of the railroad company, passed an act, declaring the Mississippi and Wabash Railroad Company "*legally organized*" under its charter of 1853, empowering the company to consolidate with any other railroad on its route, and releasing it from construction of its line of road *east* of the point of connection by such consolidation and validating "any acts or proceedings of the Board of Directors, or their agents" "releasing subscriptions to the capital stock of said company, and any substitution of any other subscriptions therefor."

Record, pages 26, 27; Record, pages 58, 59.

And from thence the Commissioners ceased to act, and the company thereafter directly conducted its affairs.

Record, page 58.

The Board of Directors of the Mississippi and Wabash Railroad Company met November 11, 1858, received reports of the Commissioners of their action, adopted a resolution reciting that the amount of work done on the road justified the company in proceeding to complete the entire line, reciting the action of the Commissioners under the act of February 14, 1857, "that Ingersoll, *Vice President* of the company, Haselton and Cline, all of Fulton County, were elected Commissioners, who supposing they were legally acting without an acceptance of said amendatory act, (as by a *judicial decision* appears necessary) proceeded to build the road from Canton, in Fulton County, to Bushnell, McDonough County, and contracted with Buel & Higbee, for completion of the same," "that said Commissioners have under their election and contract, collected from stockholders residing in Fulton and McDonough Counties, a large sum, *including Fifteen Thousand Dollars of the bonds of Fulton County, in her corporate subscription to the Mississippi and Wabash Railroad Company*, and given receipts therefor," reciting similar action of the Commissioners of the other divisions, and therefore,

"*Resolved*, That *all acts* of said Commissioners Ingersoll, Haselton and Cline, of the *Central Division* of the Mississippi & Wabash

Railroad," and of the Commissioners of the other divisions, "be and are hereby *fully confirmed* by this Board, as the *agents* of the Board, as fully and completely as if done by the Board direct and their *acts are assumed by said Board as its agents*."

Record, pages 36, 37, 38.

1.

The bonds were valid in the hands of the Railroad Company, or its agents, the Commissioners of the Central Division.

There was an election upon due order of the proper county authority, the vote was in favor of the subscription, the clerk was empowered by that authority to make the subscription and issue the bonds in payment, and he did so, complying with every requisition of the County Board, and they were received by the Company in *good faith*, and without knowledge of any defect in them of law or fact. The Railroad Company by its corporate action, ratified and confirmed the execution and delivery of the bonds to the Commissioners, its agents who received them in payment of the subscription.

It is claimed the bonds are void, because the "Central Division" is named in the subscription book and in the bonds, and because of the passage of the act of February 14, 1857.

The order of March 5, 1857, directing the subscription to be made by the Clerk "*on the books of the Central Division*," &c., is clear recognition and adoption by the County of the act of February 14, 1857, creating the divisions, and express authority to the *Clerk* to make the subscription to that division, and issue the bonds to the "*Central Division* of the Mississippi and Wabash Railroad Company."

The County authorities and people well knew what was being done to revive the enterprise and construct the road in divisions, by the sanction of that law and with acquiescence and participation therein of the Railroad Company. For years prior to the passage of the act of February 14, 1857, the Company had been engaged in construction of the road in such divisions, by like Commissioners; it was a public enterprise in which the people of the County were interested, and familiar to them and the County Board. The act was obtained in *aid* of that plan, to "*facilitate* the construction of the road," and the act, in the interest of Fulton County, provided that the Central Division should be constructed by "*Canton, Fulton County*," the principal town of the County.

It cannot be supposed that the County Board, or people were not party in interest and action in the mode adopted to secure the early completion of the road in that locality, especially when the County Board in March following the passage of the act of February, 1857, acted upon its provisions.

But it does not "*lie in the mouth*" of Fulton County to avoid the bonds by reason of that law.

The County was a *public political* corporation—a department of the State over which the law-making branch of the State government had plenary power in modifying or changing its duties, relations and powers. Robertson vs. City of Rockford, 21 Ill., 451, 457, 458. Bush vs. Shipman, 4 Scam, 186; 25 Ill., 191.

The Dartmouth College case clearly recognizes this rule as to *public* corporations. 4 Wheaton, 519. And the act of 1857 may be treated as an authorized legislative direction to a municipal corporation of the State.

The General Assembly could by statute levy taxes on the County to pay repudiated, or imperfect obligations of the County, incurred for local purposes, or compel the County authorities to pay such obligations, or validate debts of the County, created under color of law, for local improvements. Shaw vs. Dennis, 5 Gilman, 405. Thomas vs. Leland, 24 Wend. 66. Town of Guilford vs. Chenango County, 13 N. Y. R. 143. Here the

Legislature compelled the levy of local taxes to pay a repudiated debt of the Town, which could not be collected at law. Brewster vs. City of Syracuse, 19 N. Y. R. 116. Here the Legislature levied a tax on the City to pay for improvements *more* than the contract price.

Thompson vs. Lee County, 3 Wallace, 327, held that the Legislature may validate County bonds irregularly issued. Town of Keithsburg vs. Frick, 34 Ill., 405, held Legislature may legalise bonds illegally issued by a town. 9 Wallace, 477, 8 ib. 619. In Town of Freeport vs. Supervisors of Stephenson County, 41 Ill., 495, held that municipal bodies are under the control of the Legislature, and that in an act relating to alteration or change of their duties no question of vested rights could arise. Page 499, and 50 Ill., 69.

And the County of Fulton could no more complain of the legislative action in changing its relations to the railroad company—creating the divisions—than it could complain of a statute enforcing payment of a repudiated or illegal demand, or making *valid void bonds* of the County; and by the act of February 14, 1857, the County was concluded, even if it had not adopted and acted under it by the order of March 5, 1857, and directed the subscription to be made by the *Clerk* to the "*Central Division* of the Mississippi and Wabash Railroad Company."

A reasonable discretion will be conceded to the County Board in making the vote effectual, and in carrying out the general intent and purpose of the statutes, (which by their titles are declared to be in *aid of public improvements*,) and of the vote, under the change sanctioned by the act of February, 1857, or other conditions arising in furtherance of the object sought—railroad facilities.

The transaction being in *good faith*, under the vote, the orders of the County Board, and the act of February 14, 1857, and the bonds having been applied in the interest of the County, ***substantially*** to the purpose and as originally intended, this Court will look to the *substance* and *general purpose* and reject technical defenses.

And there is no just imputation of fraud appearing in the record.

The bonds in legal effect, were payable to whoever should be the holder of them. They name a payee and promise to pay that payee, "*or bearer*," and the coupons name no payee and promise to pay the "*holder*" simply.

Authority from the County Board to the County Clerk to make the subscription and issue the bonds is beyond question, and out of extreme caution, in view of the several orders on the subject, he before issuing the bonds required compliance with the condition of every of them. It was the custom of the County to issue bonds through the Clerk. Record, page 50.

It was wholly immaterial to the County to whom the bonds were payable. The County was in no way injuriously affected by the naming of a certain payee. The material matter was that the bonds were applied in payment of the subscription, and if they were, and especially if they were used in construction of the road in that immediate vicinity, which was the case, there could be no reasonable ground of complaint by the County. The payee named, might, without affecting the validity of the bonds, be a *fictitious* person, as is often the case, or the bonds might be payable to *bearer* or *holder* simply, without naming any payee. This kind of paper passes from hand to hand by delivery only, and its legal effect is the same, whether or not a certain payee be named in it. They are in legal effect like bank notes, made to pass without endorsement from party to party—a sort of governmental security, based upon a legislative grant of power to the County, and if that power exist, it is enough for those who take them for value. And to this power only need the railroad company have looked, having taken them in payment of the subscription—for stock to which the County thereby became entitled.

The Statutes of 1849 and 1854 under which these bonds issued, empower County Courts, and by operation of the township organization law, Boards of Supervisors of Counties, to aid in the construction of railroads, by purchasing or taking shares of capital stock in them, and for payment thereof, to borrow money or issue bonds of the County, and pledge the faith of the County for the payment of interest and principal on them. And provide for an election, and authorize the issue of the bonds in payment of the stock, or borrowing the money for payment, on a vote at a general election, of a majority of the votes cast for County officers, and authorize the issuance of the whole or a portion of the bonds at any time.

The County exercising the required statutory authority, every required intermediate procedure and form of procedure would be presumed, and the County would be precluded from after objection by the facts of the authority, and the issuance and delivery of the bonds. The form of the bonds or of the subscription, or how made, or by whom, with *authority* from the County Board to do the act, was in no manner prescribed by the statute. Then any manner or form, so that the issue of the bonds was substantially authorized by the County Board, was properly adopted. The bonds may be treated under the statute as payment on the subscription, or payment for stock, or as a loan of money for pur pose of payment, and in either case the form of the subscription, or whether there was any subscription, or the form of the bonds, or the named payee, is wholly immaterial, and in no way matter of complaint by the County. To the County all this was indifferent, because the bonds issued under the law and vote, and the act was a mere legal duty imposed on the County, which a Court would enforce by *mandamus*.

The order of March, 1857, states the passage of the amendment, the creation of the three divisions, and recognizes the right of the central division to the subscription and bonds. From the reading of the order in connection with the orders of 1853, 1854 and 1855, it is plain that the county board acquiesced in the amendment, in the creation of the divisions, and the appropriation of the subscriptions, means and proceeds of the stock and bonds in the central division, to the construction of the road in that division, and by this record the county is concluded. It in substance directs the making by the clerk the subscription on the books of the *central division*, and the issuing of the bonds by him to that division on presentation to him of the named certificate. And, in connection with the orders of 1853, 1854 and 1855, and the amendatory act of 1857, the order of 1857 is free of all uncertainty as to the duties imposed on the clerk.

The board might authorize any officer to make the subscription and issue the bonds in the name of the county, and they chose to confer the authority on the clerk, the keeper of their records and of the county seal.

This question is decided in Clarke vs. Hancock Co., 27 Ill., 305.

The whole case shows that the real and supposed interest of Fulton county was the creation of the central and western divisions, that the aid given the enterprise by the subscriptions in the central division, including the county aid, might be expended at the locality, and secure to it a railroad; that with this view all acquiesced in like divisions by the railroad company, prior to the amendatory act of 1857, and procured that act the better to effect the object. The stockholders, of which the *county* was one, elected commissioners for this division, under the act, and the enterprise proceeded, and the bonds were issued accordingly.

The county is therefore estopped from complaint about what was done for its benefit, with its participation and in pursuance of its record orders.

The bonds became the property of the company, and are valid in its hands, if there were authority in the board to make them, and they were made under the direction of the board, and in such case, after delivery in payment of the stock, all questions of supposed irregularity in the election, or form of subscription, or of the bonds, are immaterial. They were paid out to the company for value and without fraud.

The amendment of 1857 declares, "that for the purpose of facilitating and more effectually securing the early construction of certain portions" of the line of road, the divisons are created, and this act, as the proof shows, was obtained in the same spirit, and at the instance of the stockholders on the line of the several divisions, and acted upon by them, including the County Board. It is therefore of no consequence whether the railroad company formally, or informally, accepted the amendment, or even rejected it. Company and stockholders, including Fulton County, acted upon the supposition that the act was a part of the law of the corporation. The commissioners were elected by the parties in interest—the members of the company—and acted as such with acquiescence all round, and the bonds were received, and satisfied the County obligation to their amount, and went to pay for work on this division. Is the County in a position to complain?

But this very amendment provides that "nothing herein is intended, or to be construed to invalidate or annul any contract, agreement, or subscription made by, or to said railroad company." No statute will be construed against its declared object and purpose. The expressed object and purpose will be maintained, though it defeat other provisions, or make it, as a whole, inoperative. So by no logic could the amendment operate to avoid the *duty* of the County, arising under the statute of 1849, and the vote of the County in favor of taking the stock, to pay for it. The vote conferred no mere discretionary power on the County Board, but imposed a duty to make it effectual by taking the stock and issuing the bonds, which a Court would enforce by *mandamus*. And this duty, within the meaning of the amendment, was as much a contract, as an *actual* subscription would be. It was a *right* arising out of the statute and vote, imposing on the Board the ministerial duty of taking the stock and paying for it in County Bonds.

The proof shows that the railroad company procured the amendment of February 24, 1859, and which refers to the act of 1857, and validates the proceeding of the Board of Directors and their agents. The Directors then meet, accept the amendment of 1859, recite the proceedings under the amendment of 1857, of the Commissioners of the several divisions, and particularly that the Commissioners of the Central Division—Ingersoll, Cline and Hazelton, under their election had proceeded to construct that division, and collected and appropriated subscriptions appertaining to such division, to construction of the road, *including* $15,000 *of the corporate subscription of Fulton County*, and receipted therefor, that Commissioners of the several divisions had reported to the company, &c., and *ratify and confirm* all the acts of the Commissioners as the *agents* of the company.

The County Board acquiesce in and adopt the amendment of 1857, by their order of March, 1857, in relation to the subscription and issuance of the bonds, and the company, after the subscription, and delivery of the bonds, ratify all done under that amendment by the Commissioners, including the subscription and delivery of the bonds in payment.

If necessary to sustain these bonds, made and received in *good faith* and for *value*, the law will reject the words "Central Division" in them, and then the payee named would be the corporate name of the company at the time of the vote. In Johnson vs. Starke County, 24 Ill., 75, the Supreme Court of Illinois held, that coupons of the County made *payable in New York*, while the law made them payable at the County Treasury, would be upheld by *rejecting as surplussage* the words making them so payable. Pages 91, 92. Also, that the County having authority to issue bonds, and having issued them in payment of stock subscribed to the R. R. Company, might take up the original evidence of the debt and issue new bonds therefor, although there was no statutory authority for so doing. Pages 89, 90. And the Court say: "It would be manifestly against every principle of justice to permit the tax payers and citizens of a county, through their officers, to procure money, labor or materials, upon bonds of the county, issued on an affirmative vote of the citizens at an election held in a case authorized by law, to escape liability because of" informality which could have been readily known to the citizens before the bonds were issued. That "Counties have no right to procure the benefits of an act which they are authorized to perform, recognized and acted upon by them as legal, and then escape liability." Page 90.

In the City of Quincy vs. Warfield, 25 Ill., 317, the same Court held, where the City had issued bonds under a law providing for their payment by taxation and a sinking fund, that the City might pay them when due by issuing new bonds, having power to issue bonds, without any statutory power to issue them to *pay these bonds*, if, in the judgment of the City, it was advisable. Also that, although the law limited the rate of interest of the City bonds to eight per cent., and the bonds bore a *greater rate*, the excess of interest would be *rejected* as exceeding the power granted, and the bonds be treated as if they bore eight per cent. Pages 320, 321.

2.

The record shows that in October, 1857, Fulton County filed a bill in equity in the Circuit Court of that County against the Mississippi and Wabash R. R. Company, Ingersoll, Cline and Haselton, the Commissioners of the Central Division, Maple, the Treasurer, and Piersol, the County Clerk, "to enjoin transfer of the bonds delivered and the issuing of any more, and to set aside the subscription" made, "on which summons and injunction issued." That the bill sought relief on the ground that the charter of the Company had been materially altered after the vote by the act of 1857, that the condition of the vote had not been complied with, that the order of 1853 and vote were void, and therefore the bonds were fraudulently issued. That some of the bonds had been paid out by the Company before filing the bill, that the injunction was dissolved and the bill dismissed on final hearing, and an appeal taken to the Supreme Court by the County and *appeal* bond filed the same day, *and that no order was ever made on or after final decree continuing or reviving the injunction.*

Record, pages 43, 44, 45. Also, Record, page 55.

Also an order of the Supreme Court of January term, 1859, in same case, "reversing the decree of the Circuit Court for error and nothing more." Record, page 55.

The chancery proceeding against the Company commenced after the delivery of the bonds in payment of the stock, can cut no figure in this case.

The bill was filed for injunction and *general relief*—temporary injunction granted, and on hearing, injunction dissolved and bill dismissed. If there was an appeal from the decree, there was no order *reviving* or *continuing* the injunction. In the Supreme Court the decree below was reversed, and from that time, January, 1859, the County has abandoned the suit.

It was not a case where the law allowed an appeal, there being no decree for money, exclusive of costs, and no franchise or freehold being involved. Gross' Statutes of 1868, 513, § 58. 4 Gilman, 353.

The statute provides that appeals shall be allowed "where the judgment or decree appealed from be *final* and shall amount, exclusive of costs, to twenty dollars, or relate to a franchise or freehold." Here was no such decree. And the bond in appeals is required to be sufficient only to cover the judgment appealed from and costs. Gross' Statutes of 1868, 513, §58.

If the law did not allow an appeal, the taking of one in fact, and carrying the record to the Supreme Court by giving ordinary appeal bond, would in no manner suspend or affect the force of the decree dissolving the injunction. The injunction was dead by force of that decree, and could not be "made alive" by an irregular proceeding of the complainant.

The statute also provides that no injunction shall be granted without bond and security, to be approved by the Court or Judge, "*in double the sum* directed to be enjoined," conditioned for the payment of all *damages* in case the injunction be dissolved. Gross' Statutes, 1868, page 457, § 11. This is entirely different from the bond required on appeal, and the appeal bond was no indemnity against *damages* on account of the injunction. The original injunction bond had ceased to be operative on account of anything *subsequent* to the decree dissolving the injunction, and constituted no security against damages after that moment. And had there been a contemplated continuance of the injunction, a new injunction bond would have been required.

A regular appeal from the decree without application to the Court for, and the granting of an order reviving or continuing the injunction pending the appeal, would not have suspended the portion of the decree dissolving the injunction. This is fully settled in the following cases:

Hart vs. Mayor of Albany, 3 Paige, 381.

Graves vs. Maguire, 6 Paige, 379—381.

2 Hoffman's Chy. Prac. 64, and notes.

Garrow vs. Carpenter, 4 Stewart & Porter, 336.

13 John, 139.

7 John, Chy. 295.

But the Supreme Court, or the Court in which the decree is rendered, on proper showing, will grant an order reviving the injunction until the appeal or writ of error is determined.

Champlin vs. Morgan, 18 Ill., 293.

Appeals lie only from *final* decrees, and that portion only of this decreee was such, dismissing the bill and for costs.

After the dissolution there was no injunction, and could be none without further action of a court in the exercise of judicial discretion. The appeal of the party created no injunction, nor could have more effect than to suspend the dismissal of the bill and the recovery of costs.

The granting, continuing, reviving and dissolving injunctions, are collateral to the suit for other relief, and decrees upon them have not the quality of *final* adjudication. They are the exercise of the discretionary powers of a court, not subject to review in another tribunal. And the only effect the order of reversal could have is to enable the complainant in that suit to proceed upon his bill, and obtain at another hearing, such relief as the Court might grant.

Young vs. Grundy, 6 Cranch, 51.

2 Hen. & Munf., 16.

2 Wash., 201.

1 Comst., 534.

The abandonment of the bill, if there were an existing injunction, for ten years, would be treated by this Court as the abandonment of the temporary injunction in aid thereof, and a virtual dissolution of it.

And there is no evidence in the record what the allegations of the bill were, or of any certain description of the bonds therein, so that the rule of *lis pendens* could apply.

3.

The County has cured any irregularity, by ratification after the issuance of the bonds.

They were issued September 1, 1857, and a record of them, and receipts for them of the Commissioners of the central division, appeared in the records of the County Board. The Board, individually and collectively, evidently knew the fact, and made no objection, until the institution of suit in October following. Nor indeed, until this period, was any question raised or entertained by the County authorities, against the propriety of the subscription, and issuance of the bonds, as done under the orders of the Board of 1854, 1855, and of March, 1857.

Record, pp. 51, 52.

Nor until September, 1858, did the Board question the propriety of the amendment of 1857, or rescind its orders authorizing the Clerk to do as he did.

Record, page 53.

The County paid interest on the bonds, and advisedly. The Clerk, Piersol, testifies in substance that the County Treasurer paid interest on some of the bonds, and was allowed the same in his settlement with the County Board, on delivery of the coupons as his vouchers.

Record, pages 63—64.

Shope testifies that, in 1866, he found in the Clerk's office, canceled coupons of these bonds. And the records of the Treasurer's office containing a register of these bonds, shows payment of interest on some of them for 1858, and on one from 1858 to 1867.

Record, pages 68—72.

Also interest paid on bonds 1, 2, 5, 6, 7, 8 and 15, 5 and 7 of which are included in this record. Record, pages 45 and 33.

The records of the County Board, of annual session, held 15th of September, 1857, after these bonds were issued and delivered, shows adoption of report of finance committee, estimating amount required to pay interest on County bonds, "issued and to be issued" that year, including County expenses, and interest on railroad bonds, and levying a tax to pay the same, with no reservation or exception as to these bonds. Record, page 48.

At session held September 15, 1857, the Board appointed Graham and Perry, County Agents as to this railroad, and required *them to* *attend the meetings of stockholders, election of officers, and to represent the County "as a stockholder."* Record, page 48.

And this was at the session of the Board next following the issue and delivery of the 15,000 dollars of bonds, and was evidently done with sanction of the issue the same year of the 60,000 dollars, the residue of the 75,000 dollars subscribed.

It is true the record shows that the County, from 1857 to 1859, issued bonds to other railroad companies, doubtless under special laws, but it does not appear that at the September session, 1857, any other bonds had been issued by the county. Record, page 39.

The Clerk issued certificates of appointment to the County Agents, and they were paid by the County for their services. Record, pages 64 and 66.

At the session of March, 1858, the Board appointed a financial agent to manage sinking fund on "railroad bonds." September, 1858, Board appointed a committee to estimate amount of money for current year, required to pay interest on County bonds, "issued for railroad purposes," and committee report that $350 was needed to pay interest on $4,500 of these bonds. Record, pages 49, 50.

At March session, 1858, ordered that the claim of Graham, Agent of County as to Mississippi and Wabash R. R. Company, for services as such agent, be paid. Record, page 49.

At September session, 1859, ordered that County Treasurer pay "the interest on the Fulton bonds," and without any reservation.

At September session, 1860, ordered that County Treasurer pay all coupons presented prior to March, 1861, and from June, 1861, purchase as many bonds, at not exceeding sixty cents of the dollar, as sinking fund will pay. Record, page 50.

September, 1865, the Board pay two of the bonds at a discount. Record, page 53.

September, 1866, the Board order payment of two more of the bonds *in full*, upon recommendation of finance committee, that "*they entertained no doubt*," "*that they ought to be paid*," and they were surrendered.

The next day the Board, by order, refused to pay the bonds. Record, page 54.

Dykes and Stipp, who were members of the County Board, are called to prove *they* did not know of payment of interest on the bonds. But they say they knew it only from what they heard—common report, and examination of the Treasurer's books.

Interest was paid, and portions of the *paid* coupons remained in the Clerk's office until 1866. And it is singular that the County should now attempt to avoid the effect of their action by proof that two of the Board, consisting of probably twenty-five members, did not *officially* or *personally* know the facts.

The County exercised the rights of a stockholder in the railroad, which it could only do on the ground that the subscription and bonds given in payment were valid.

The subscription and issuance of the bonds were public, official acts, in their nature of necessary notoriety, and the public records of the County contained evidence of what was done. It is unnatural to suppose the County authorities and people were ignorant of the subscription *as made*, and that the bonds would issue according to the subscription. It was notorious, and well understood by the Board, as shown by their order of March 5, 1857, that the old board of the M. & W. R. R. Co. had no active vitality, and that the commissioners for the central division alone were engaged in building the road in that division, and with the subscriptions, public and private, of those immediately interested in the enterprise. The County Agents in discharging their duties imposed on them by order of the County Board, doubtless cast the County vote for these commissioners, and the divisions had been created on the solicitation of the stockholders themselves. Yet the County authorities—the County Board and people—did nothing evincing dissatisfaction, or in avoidance of the subscription or delivery of the bonds, until October, 1857, but on the contrary, the Board, at its annual meeting, fifteen days after the bonds were issued, claiming to be a stockholder in the road, appointed two of their number to represent the County as such stockholder. The law compelled the Board to meet on the second Monday in September. Acts 1851, page 51. And they made this order September 16, 1857, and must have been in session for some days, and have known all about the delivery of the bonds. No fraud or secresy is pretended, and no action of the Board inconsistent with their sanction of the delivery of the bonds, at this session, appears.

On September 15, 1857, at the same session, the Board adopted the report of their finance committee, estimating the amount necessary to pay the interest on the County bonds *indiscriminately*, issued for railroad purposes, and levying taxes to pay it.

The payments of interest on some of the bonds goes to the whole· This is an unequivocal recognition that they are a debt of the County, and all stand on the same footing. All or none are obligations of the County. They issued under the same authority, in the same manner, and in payment of the same debt. There can be no question the board acted advisedly, when, at the same session, September, 1857, they provided for payment of the interest on the bonds to become due the following year, and assumed the position of a stockholder by reason of the issuance of the bonds, and when it appears that from time to time thereafter, they asserted that position in calling for and acting on reports of their agents to represent the County as such, and accepted a resignation and filled the vacancy. Record, pages 49, 50. And all the evidence and presumptions are in harmony with the fact of their deliberate action. The estimate of money required to pay the interest due in 1858, adopting recommendation of finance committee levying the tax, and which is the levy in fact of that year, the appointment of agents to cast the vote of the County as a stockholder, and their action as such and reports to the Board, payment for their time, filling vacancy by resignation of agent, payment of interest, settlement with Treasurer on his vouchers of coupons paid, settlement of a portion of the bonds at discount, providing for buying them up at 60 cents of the dollar, orders for indiscriminate payment of interest on County bonds, adoption of report that others of these bonds were "a value due by the county" and "ought to be paid," order of surrender of them to the County, their actual surrender and order for their payment in full, precludes the County from objection to the validity of these bonds. Indeed, the action of the Board at the September session, 1857—on the 15th and 16th—is conclusive on this subject, and wholly irreconcilable with any other position of the County than that of a stockholder in the road by reason of the vote, the subscription and payment by these bonds, and after this, were there no other confirmatory acts, the county could not retract.

4.

We submit that the commissioners of the central division, or the M. &. W. R. R. Company, treating the commissioners as the *agents* of the corporation, held the bonds as innocent purchasers for value. By the payment of the bonds, the County acquired the rights of a stockholder and exercised them, and *pro tanto* paid the County subscription. The divisions were procured by the subscribers, or members of the railroad company, to subserve their supposed interests, secure the expenditure of their subscriptions at their own locality, the more certainly to obtain railroad facilities. And it is immaterial whether the central division is treated as a corporation, a *quasi* corporation, or whether the commissioners are treated as the *agents* of the M. & W. R. R. Co., authorized so to act, as they were finally declared to have been, and their acts confirmed by that company after the passage of the act of 1859. The subscription and bonds went to the same enterprise, and substantially to the M. & W. R. R. Co., and they, in legal effect, were payable to *bearer*, and the commissioners received them, and the County delivered them in good faith, by acquiescence of the M. & W. R. R. Co., and that company afterwards confirmed their action. Record, page 37.

But be this as it may, Buel and Company, the contractors, took them in good faith, and for value—in payment for work on the road—and Thompson bought them in like good faith, and for value, some of them before the injunction, and some after its dissolution. Record, pages 44, 60, 76, 77, 79. There was power in the County to issue like bonds, they were issued by authority of the County, and nothing appeared on their face, in law, to effect their validity—they were simply County bonds, with interest coupons, payable to whoever should be the *holder* of them, and gave no notice, either in law or fact, of any defect. Suppose these several purchasers did then live in Fulton county, there is no proof they knew of any irregularity in anything done, or omitted ; and as to the bonds they purchased after the injunction, they, nor either of them were party to that suit, nor bound by it. That Buel then *lived* in the county is not sufficient even to charge him with notice, in fact, of the suit. But, if these purchasers had heard of the suit, they not being parties to it, had not, in contemplation of law, notice of the allegations of the bill, or of the relief prayed for. And even if they had notice, the bill being for injunction against others, from negotiating those of the bonds then in their hands, and that injunction, by decree of court, having been dissolved, Buel and Co. had a perfect right to purchase them, and also had Thompson a right to purchase them of Buel. The injunction was at an end by the decree, the restraint was removed, and any one could purchase. They were not bound to look further. And this injunction being dissolved by the decree, and the bill dismissed, there could be no hindrance of legal transfer to any one. In such case the *law* presumes the decree right, and all may act upon that presumption. Even if properly appealed from, and proper subject of appeal, the presumption continues until reversal.

Williamson vs. Field, 2 Barber's Chy. R., 281, 283.

Adams' equity, 401.

The residents of a county are no more parties to a suit of the county than are foreigners. Unlike private corporations, there is no private or individual interest in the sense of members of such corporations, They are, upon this principle, competent witnesses for the county. Nor are they bound to take notice of such suit any more than the inhabitants of a State are of judicial proceedings of the State.

And the reversal was in 1859--long after the purchase of the bonds and removal of restraint by injunction. Indeed, the whole proceeding is virtually abandoned by the county, by non-action in the matter of the suit from the reversal in 1859.

The reversal created no decree of the circuit court, but left the matter as to relief for further hearing in that court, if the county chose to carry the case to such hearing. The stipulation of January 4, 1869, disposes of any question of jurisdiction of this court and of the issue for trial. If any question is raised as to the purchase of the bonds by the plaintiff, I refer the Court to Newkirk vs. Cone, 18 Ill., 449, 451 to 455, a case decided upon the statutes of this State. The plaintiff was the legal holder of the bonds.

We submit that Fulton county has no plausible excuse for repudiation of these bonds. The object of the vote, subscription, and delivery of the bonds in payment, was to aid in an enterprise for development of the resources of the section, increase the value of taxable property of the county, and thereby its revenues, and the wealth of its people. Others—individuals, counties, and cities—acted upon the plighted faith of Fulton county, and subscribed and paid hundreds of thousands of dollars to aid this enterprise—the road is built and in operation through the entire body of the county, forming a line of road from the Mississippi to the Atlantic. Record, page 84. The County and the people have obtained what induced the vote, subscription and delivery of the bonds—have got it by a debt of $15,000, when the county should have paid the whole subscription, $75,000, and for one of the wealthiest counties of the State now to repudiate these bonds, is an example of so bad influence as to incline a court to recoil from sanction of its consummation.

Subscriptions to railroads in this State, at the period of the vote and subscription in this case, were, and even now are, made with a view to the incidental benefits to be derived from the public improvement, and not from anticipated profit from stock, and especially so in case of counties and cities, and Fulton county may now take the stock by paying her subscription, in the consolidated line of equal value, at least, to that in the old M. & W. R R. Co., had that company been able to build the line of road. Record, page 85. Courts will endeavor to uphold rights arising out of transactions had in good faith, and upon which others have acted.

From the course of the defendant's counsel, it may be contended that the resolution of the railroad board of June, 1856, affects the question. Record, page 35. If so, we answer, it names "*persons* residing in Fulton county, *having subscribed*," and has no reference to the County; the County had not then subscribed; the road in Fulton county was put under contract, offers may have been made acceptable to the company to build the road from Canton to the Illinois river, and it appears from the evidence that Ingersoll was a director residing in Fulton county, and desired collection of the County subscription, though Stipp, another, who refused to act after 1856, did not.

Also, that the directors, in 1853, ordered certain subscriptions canceled. Record, page 39. Our answer is, this was done years before the Fulton county subscription was made, was simply the common course, where a few persons, to effect an organization of a railroad company and forward the enterprise, take the requisite amount of stock, with the expectation of afterwards substituting in their stead general subscriptions of such sums as parties are able and expect to pay. Besides, the tenth section of the amendment to the charter of the company of 1859 expressly validates the acts. Record, page 27. And by this the *County* was bound.

And the order of the County Board of March, 5, 1857, in effect, waived any supposed advantage on account of them, and anew directed the subscription and issue of the bonds.

But in no view could any such acts of the company affect these bonds after their issue, and especially in the hands of third parties.

We need not cite the numerous cases in this Court sustaining our positions, that where municipal bonds have passed into the hands of another for value, and without fraud, they are valid in his or the hands of *any* subsequent holder, if the County had authority to issue like securities, and they were issued by authority of the County; that if there be such authority, and the public authority act irregularly, it is for those interested to intervene before the bonds issue, by application to the courts, and if they fail to do so, that the holder for value without fraud is protected; that where such power exists, and it is defectively or irregularly exercised, the defect or irregularity is cured by subsequent action of the County authorities, recognizing the existence of the obligation, or by acting inconsistent with its non-existence; and that such bonds are commercial paper, in regard to which the State decisions have no binding force in this Court.

Besides, the case decided by the Supreme Court of Illinois upon these bonds, was a bill in equity of the County against the R. R. Company, its Agents, and the County Clerk, to enjoin negotiation of the bonds and obtain cancellation of the subscription, and it is evident from the opinion, the facts in that record, even as to the action of the County Board and the R. R. Company, were very different from those appearing in this. 21 Ill., 338 to 374.

The Supreme Court of Illinois, in the case of Supervisors of Marshall County vs. Cook, 38 Ill., 44, treating the statute of November, 1849, as prohibiting a subscription and issue of bonds without an affirmative vote of the county therefor, held bonds of that county void in the hands of innocent holders for value, because the election was ordered by the *County Court*, when by law it should have been ordered by the Board of Supervisors. The same court, in Board of Supervisors of Schuyler County vs. Farwell, 25 Ill., 181, where the election was called by the Board of Supervisors under a special statute authorizing the *County Court* to call the election, make the subscription and issue the bonds, held the bonds void.

This Court, however, in the case of Supervisors of Marshall County vs. Schenck, 5 Wallace, 772, held the bonds of the county of Marshall valid, notwithstanding the wrong authority called the election, the bonds having been negotiated; and held that in such case it was sufficient if the County had authority to issue such bonds. The principle of this case fully sustains what we assume, and was decided in view of the Illinois decisions holding them void. We submit the Court erred in instructing the jury that the bonds were void, and in refusing the several instructions prayed for by the plaintiff.

O. H. BROWNING and
O. C. SKINNER,
For Plaintiff in Error.

railroad company and forward the enterprise, take the requisite amount of stock, with the expectation of afterwards substituting in their stead general subscriptions of such sums as parties are able and expect to pay. Besides, the tenth section of the amendment to the charter of the company of 1859 expressly validates the acts. Record, page 27. And by this the *County* was bound.

And the order of the County Board of March, 5, 1857, in effect, waived any supposed advantage on account of them, and anew directed the subscription and issue of the bonds.

But in no view could any such acts of the company affect these bonds after their issue, and especially in the hands of third parties.

We need not cite the numerous cases in this Court sustaining our positions, that where municipal bonds have passed into the hands of another for value, and without fraud, they are valid in his or the hands of *any* subsequent holder, if the County had authority to issue like securities, and they were issued by authority of the County; that if there be such authority, and the public authority act irregularly, it is for those interested to intervene before the bonds issue, by application to the courts, and if they fail to do so, that the holder for value without fraud is protected; that where such power exists, and it is defectively or irregularly exercised, the defect or irregularity is cured by subsequent action of the County authorities, recognizing the existence of the obligation, or by acting inconsistent with its non-existence; and that such bonds are commercial paper, in regard to which the State decisions have no binding force in this Court.

Besides, the case decided by the Supreme Court of Illinois upon these bonds, was a bill in equity of the County against the R. R. Company, its Agents, and the County Clerk, to enjoin negotiation of the bonds and obtain cancellation of the subscription, and it is evident from the opinion, the facts in that record, even as to the action of the County Board and the R. R. Company, were very different from those appearing in this. 21 Ill., 338 to 374.

The Supreme Court of Illinois, in the case of Supervisors of Marshall County vs. Cook, 38 Ill., 44, treating the statute of November, 1849, as prohibiting a subscription and issue of bonds without an affirmative vote of the county therefor, held bonds of that county void in the hands of innocent holders for value, because the election was ordered by the *County Court*, when by law it should have been ordered by the Board of Supervisors. The same court, in Board of Supervisors of Schuyler County vs. Farwell, 25 Ill., 181, where the election was called by the Board of Supervisors under a special statute authorizing the *County Court* to call the election, make the subscription and issue the bonds, held the bonds void.

This Court, however, in the case of Supervisors of Marshall County vs. Schenck, 5 Wallace, 772, held the bonds of the county of Marshall valid, notwithstanding the wrong authority called the election, the bonds having been negotiated; and held that in such case it was sufficient if the County had authority to issue such bonds. The principle of this case fully sustains what we assume, and was decided in view of the Illinois decisions holding them void. We submit the Court erred in instructing the jury that the bonds were void, and in refusing the several instructions prayed for by the plaintiff.

O. H. BROWNING and
O. C. SKINNER,
For Plaintiff in Error.

IN THE

Supreme Court of the United States,

December Term, A. D. 1870.

No. 481.

CALEB P. MARSH, Plaintiff in Error,

—vs.—

THE BOARD OF SUPERVISORS OF FULTON CO., ILLS.,
Defendants in Error.

Error to the Circuit Court of the United States, for the Southern District of Illinois.

ARGUMENT FOR DEFENDANTS IN ERROR,

BY S. CORNING JUDD.

Beach & Barnard, Steam Printers, 126 South Clark Street.

IN THE

Supreme Court of the United States,

December Term, A. D. 1870.

No. 481.

CALEB P. MARSH, Plaintiff in Error,

—vs.—

THE BOARD OF SUPERVISORS OF FULTON CO., ILLS.,
Defendants in Error.

Error to the Circuit Court of the United States, for the Southern District of Illinois.

ARGUMENT FOR DEFENDANTS IN ERROR.

MAY IT PLEASE THE COURT: The defense in this case rests upon the following leading facts and considerations:

I. THERE WAS NO VOTE IN FAVOR OF THE COMPANY TO WHICH THE BONDS WERE ISSUED—HENCE NO POWER EVEN IN THE BOARD OF SUPERVISORS TO ISSUE THEM; MUCH LESS IN THE CLERK WHO EXECUTED AND DELIVERED THEM WITHOUT ANY AUTHORITY WHATEVER.

The Statutes of Illinois touching the authority of counties, &c., to vote and subscribe for stock in railroad companies, and to issue bonds therefor, are set out and referred to in the Brief and Argument of counsel for the plaintiff in error, at pages 2, 3, 4 and 5, except § 2 of Art. xv. of the Township Organization Act of 1851, (Laws of 1851, page 50—2 Purple's Statutes, page 1146,) which provides that, "*No County*" * * "*shall possess or exercise any "corporate powers except such as are enumerated in this "Act, or shall be specially given by law*," &c. The same provision was re-enacted in 1861, (Gross' Statutes of 1868, page 751, § 2.) The other statutory provisions referred to on page 5 of the plaintiff's Argument, were also embraced in the Township Organization Act of 1851, Laws 1851, pp 50 and 51, Art. XV., § 4, and Art. XVI., § 4, subdivision. 5.—2 Purple's Statutes, pp. 1146–7.

The 4th section of the Act of 1849, (plaintiff's Argument, page 3,) provides that, "*No subscription shall be "made, or purchase or bond issued, by any county*," * * "*unless a majority of the qualified voters of such county*" * * "*shall vote for the same.*" The same section provides that the notices of the election "*shall* SPECIFY THE "COMPANY *in which stock is proposed to be subscribed.*"

On the 31st day of August, 1857, *the Clerk* of the County Court of Fulton County, Illinois, signed and delivered to the Commissioners of the "*Central Division* "of the Mississippi and Wabash Railroad Company," (who demanded them for such Division,) thirty bonds of $500 each, each bearing date on the 1st day of September, 1857, and numbered from one to thirty inclusive, having interest coupons attached thereto, the obligatory part of which bonds reads as follows:

"Know all men by these presents, that there is due from "the County of Fulton to the *Central Division* of the "Mississippi and Wabash Railroad Company, or bearer, "Five Hundred Dollars, lawful money of the United "States, with interest at the rate of seven per cent. per "annum, payable annually on the first day of July in "each year, at the Treasury of the said County of Fulton, "on presentation and surrender of the annexed coupons. "The principal is to be due and payable ten years after "the date hereof." (Record 41, 43 and 31.)

The bonds contain no other recitals or reference as to either any law or fact, but the heading contains the designating words: "Central Division, Mississippi and Wa-"bash Railroad Company."

This suit is brought to recover against the County of Fulton upon Bonds 1, 3, 4, 5, 7, 11, 12, 13, 14, 16, 17, 18, 19, 20, 23, 24, 25, 27, 28 and 29, and npon the coupons attached to the same. By stipulation, the execution of the bonds and coupons is to be treated and considered as denied as fully as by any pleading and oath it could be. (See stipulations, Record, page 40.)

The Mississippi and Wabash R. R. Co. was created and organized under a charter granted by the Legislature of Illinois, in February, 1853, and its projected line of road was about 230 miles long, extending through the entire State, from Warsaw on the Mississippi river eastward, *by way of Bloomington, Ill.* (See Private Laws of Illinois, of 1853, page 73; also Record, pages 21, 41, 77 and 83.) The "Central Division of the M. & W. R. R. Co." was only about 53 or 60 miles long. (Record, pages 77 and 83.)

On the 16th of September, 1853, the Board of Supervisors of Fulton County passed an order, (set out at pages 27 and 28 of the Record), repealing an order passed in June of that year, and submitting the proposition to the voters of the county, at the then ensuing November election, as to whether or not the said county should subscribe $75,000, to the ***Mississippi and Wabash R. R. Co. and also*** the like sum to the Petersburg and Springfield R. R. Co., (*a joint proposition as to subscribing* $75,000 *to each of the two roads,*) under the express proviso that no bonds should issue to the M. & W. R. R. Co., until $700,000 should be subscribed to the capital stock of the Company, and five per cent. thereon paid in. That this was the only proposition submitted to the voters, and that *no proposition was ever submitted in respect to taking stock in the Central Division of the M. & W. R. R. Co.," is admitted* by stipulation. See Record, page 39. At the election the proposition to so subscribe to the stock of said companies, under said order and conditions, was carried.

In February, 1857, an amendment to the charter of the M. & W. R. R. Co., was enacted by the Legislature, dividing the line of the railroad into the Eastern, Central and Western Divisions, (the *Central Division* embracing that part between the C. B. & Q. R. R. and the Illinois River, *about* 60 *miles in length*—including Fulton County,) placing each Division under the management and control of a Board of three Commissioners, to be elected by the stockholders of the Divisions respectively, subjecting the stock, subscriptions and effects of the several Divisions to the purposes of such Divisions respectively, and to the management of the Commissioners of such respective Divisions, and conferring corporate powers upon the Commissioners of each of the Divisions, &c., &c. (See Private Laws of Ill., of 1857, p. 1053. Also, Record, p. 22, &c.) This amendment was not formally accepted by the Board of Directors of the M. and W. R. R. Co., or at any meeting of the stockholders, but the Commissioners chosen for and by the Central and Western Divisions respectively assumed and exercised the powers conferred by said act, with the acquiesence of, and without any objection from, the Board of Directors or stockholders of the original company, until December 1858. See stipulation, at pages 41 and 42 of the Record. [The County of Fulton objected and through a bill in Chancery filed October 9, 1857, enjoined the further issue by the Clerk of bonds to said "Central Division," and prayed relief against the thirty bonds issued by such Clerk, but was not a stockholder of the Mississippi and Wabash Railroad Company—never having subscribed to the capitol stock, nor received certificates of stock. And in September, 1858, the Board of Supervisors adopted a resolution disclaiming liability, and protesting against the amendment of 1857. See Record, pages 43, 44, 47, 53, 65, 66, 77, 86 and 87.] In April, 1857, the stockholders within the Central Division, without objection by the Board of Directors or stockholders of the original company (Mississippi and Wabash R. R. Co.,) elected Commissioners of such Division, who chose a president, and which Commissioners thereafter, until December, 1858, exercised all the powers granted by said Act of 1857 to said Commissioners, obtained from the original company the stock and other books pertaining to said Central Division, and, in the name of the "*Central Division* of the M. and W. R. R. Co.," received new subscriptions of stock, collected prior and new subscriptions, and applied the same to the construction of the road of said Central Division, entered into a contract with E. P. BUELL & Co. to construct the road of said Central Division, who performed grading and furnished materials under such contract to the value of about $75,000—all which was done, with other corporate acts, by said Central Division, without objection from the original company. These facts appear from the stipulation and evidence at pages 42, 43 and 92 of the Record, and from other evidence in the case.

It was proven on the trial that "*the stock of the said Central Division*" corporation "*would be worthless*, or nearly so, but that *the stock in the original*" *road*, (M. & W. R. R. Co.,) "completed, *would be as valuable as that in other* "*railroads* of the State." (Record, page 91.)

On precisely this state of facts the Supreme Court of Illinois, (in the Chancery proceedings before alluded to, enjoining the transfer of the $15,000 of bonds issued by the Clerk, and also involving the remaining $60,000 of the $75,000, voted in favor of original M. & W. R. R. Co.,) in construing the Amended Charter of 1857, as considered with the acts and doings of the stockholders and Commissioners of the Central Division render the same—*on precisely this state of facts*, I say, the Supreme Court of Illinois held this "CENTRAL DIVISION of the Mississippi and "Wabash R. R. Co.," *to which the bonds in controversy were issued, to be a separate and distinct corporation* from the "MISSISSIPPI & WABASH R. R. Co.," *to which the subscription was voted.* See *Supervisors Fulton Co.* v. *Mississippi and Wabash R. R. Co. et al*, 21st Ill., pp. 369, 372, inclusive. At the latter page the Court say: "We can "not but consider, for the reasons given, this company (the "*Central Division*) thus acting, as ANOTHER AND DIFFERENT "COMPANY FROM THE ONE TO WHICH THE SUBSCRIPTION WAS "MADE,"—[*voted*, the Court undoubtedly meant, for the stock never was subscribed except on the books of the Central Division, which was done by the Clerk, who issued the $15,000 in bonds to that Division.] At the same page the Court add: "There is nothing appearing on the rec-"ord to show that it," (the Central Division corporation,) "has succeeded to the rights of the original company in "any form authorized by law," * * "For anything "that appears, *the old company in its original form is still "in being, and may demand these bonds.* We are clearly "of opinion, *the Central Division of the road is not entitled to the bonds*, and accordingly reverse the decree "entered in the cause."

The Court below followed this decision of the Supreme Court of Illinois, and held that the "*Central Division* of "the M. and W. R. R. Co.," was a separate and district corporation from the M. and W. R. R. Co., to which the subscription was voted, and hence that the bonds issued to such "Central Division" Company, by the Clerk, were so issued without any power or authority, and therefore were void.

Now, *it is not pretended that any subscription was ever voted*, by the voters of Fulton County, to the "*Central Division* of M. & W. R. R. Co.," on whose books the *County Clerk* entered the subscription, and to which Division or corporation he issued the bonds or coupons in controversy, *without any authority whatever*. That no vote was ever had in favor of the "Central Division" corporation is admitted by stipulation. [See Stipulation, page 39 of Record.] And the only order or resolution of the Board of Supervisors, under which the "Central Division" is in any way recognized as having even a remote interest in the subscription voted, is the order of March 5, 1857, [Record pp. 29, 30 and 31,] and even that order recites the vote to the M. & W. R. R. Co., and provides that, certain conditions being first complied with, "the bonds of the county shall be issued *in accordance with the provisions of the* ORIGINAL ORDER,"—that is, to the original "*Mississippi & Wabash R. R. Co.*," and not to the "Central Division" corporation. [For the *original order*, (i. e., of September 16, 1863,) see Record page 28.] My opposing brothers lay great stress, in their Argument, upon this order of the Board of Supervisors of March 5, 1857, referred to; but their eye-sight becomes very defective when they come to the last portion of the order, which directs that, the conditions recited being complied with, "the bonds of the County shall issue *in accordance* "*with the provisions of the* ORIGINAL ORDER." [Record, p. 31.] At least, for *some reason*, this most important feature of the order is wholly ignored throughout their entire Argument.

The Board of Directors of the M. & W. R. R. Co., at a meeting, Nov. 11, 1858, refused to accept, and *rejected the amendment to their Charter af Feb'y*, 1857. [Record page 38.

By the 12th section of an Act of the Illinois Legislature, passed February 24, 1859, amending the Charter of the Mississippi and Wabash Railroad Company, (and which amendment was immediately accepted by that Company,) [Record, p. 44.] the act of Feb'y, 1857, under which said "Central Division" corporation was created, was repealed, [See Private Laws of Ill. of 1859, pp. 479 and 482.] This act of 1859 was introduced in evidence on the trial below, (Record, page 25,) but by some mistake the repealing section referred to was not copied into the Record. The facts stated, however, are admitted by stipulation, as may be seen at page 44 of the Record.

II. THE PLAINTIFF NOT AN "INNOCENT PURCHASER."

The testimony of JAMES M. THOMPSON, taken by the defense, (and to be found at pages 79, 80 and 81 of the Record,) shows that the plaintiff is very far from being an *innocent purchaser* of the bonds and coupons in controversy, and that THOMPSON himself is the real plaintiff in interest. It is apparent, on the face of the transaction, that the bargain was really one with the distinguished attorneys whose names figure in that testimony, and was made to obtain their professional services in the premises. The arrangement was made with Mr. MARSH, of the law firm of SKINNER & MARSH, of Quincy, Illinois, (Mr. MARSH being a brother of the plaintiff,) and which law firm were the attorneys of record for the plaintiff in the Court below. [Record, p. 18.] Mr. MARSH, the attorney, represented himsely to THOMPSON as the agent of MARSH, the plaintiff. If the transaction was in good faith, MARSH, the plaintiff, is nevertheless chargeable, through his agent, with all that was done or said in the matter. *Qui facit per alium facit per se.* I quote from THOMPSON's testimony the following, (Record, p. 79, &c.):—

"I have resided in Fulton County 22 years. Knew of " the suit of the County against the M. & W. R. R. Co., " and others, within a day or two after it was commenced. " knew of the issuance of the bonds. I purchased some " $9,000 of them of BUELL for my hotel property. Before " the injunction suit I received $3,000 of them, numbered " between 1 and 8, with coupons. My recollection is that " among the numbers of the bonds taken by me of BUELL, " after the injunction, are," [the number of those sued on are here given, except Nos. 1, 5 and 7.] "These last " bonds, (i. e., all except 1, 5 and 7,) were taken by me " after the decree of the Circuit Court dissolving the injunction—on that or the next day." [The case was appealed to the Supreme Court instanter, upon the rendition of the Circuit Court decree, as the Record shows, at page 55.] The other bonds and coupons in controversy, (Nos. 1, 5 and 7,) I received before the injunction. I *understand* the original "*Mississippi & Wabash R. R. Co.*," and not to the "Central Division" corporation. [For the *original order*, (i. e., of September 16, 1863,) see Record page 28.] My opposing brothers lay great stress, in their Argument, upon this order of the Board of Supervisors of March 5, 1857, referred to; but their eye-sight becomes very defective when they come to the last portion of the order, which directs that, the conditions recited being complied with, "the bonds of the County shall issue *in accordance* "*with the provisions of the* ORIGINAL ORDER." [Record, p. 31.] At least, for *some reason*, this most important feature of the order is wholly ignored throughout their entire Argument.

The Board of Directors of the M. & W. R. R. Co., at a meeting, Nov. 11, 1858, refused to accept, and *rejected the amendment to their Charter af Feb'y*, 1857. [Record page 38.

By the 12th section of an Act of the Illinois Legislature, passed February 24, 1859, amending the Charter of the Mississippi and Wabash Railroad Company, (and which amendment was immediately accepted by that Company,) [Record, p. 44.] the act of Feb'y, 1857, under which said "Central Division" corporation was created, was repealed, [See Private Laws of Ill. of 1859, pp. 479 and 482.] This act of 1859 was introduced in evidence on the trial below, (Record, page 25,) but by some mistake the repealing section referred to was not copied into the Record. The facts stated, however, are admitted by stipulation, as may be seen at page 44 of the Record.

II. THE PLAINTIFF NOT AN "INNOCENT PURCHASER."

The testimony of JAMES M. THOMPSON, taken by the defense, (and to be found at pages 79, 80 and 81 of the Record,) shows that the plaintiff is very far from being an *innocent purchaser* of the bonds and coupons in controversy, and that THOMPSON himself is the real plaintiff in interest. It is apparent, on the face of the transaction, that the bargain was really one with the distinguished attorneys whose names figure in that testimony, and was made to obtain their professional services in the premises. The arrangement was made with Mr. MARSH, of the law firm of SKINNER & MARSH, of Quincy, Illinois, (Mr. MARSH being a brother of the plaintiff,) and which law firm were the attorneys of record for the plaintiff in the Court below. [Record, p. 18.] Mr. MARSH, the attorney, represented himsely to THOMPSON as the agent of MARSH, the plaintiff. If the transaction was in good faith, MARSH, the plaintiff, is nevertheless chargeable, through his agent, with all that was done or said in the matter. *Qui facit per alium facit per se.* I quote from THOMPSON's testimony the following, (Record, p. 79, &c.):—

"I have resided in Fulton County 22 years. Knew of "the suit of the County against the M. & W. R. R. Co., "and others, within a day or two after it was commenced. "knew of the issuance of the bonds. I purchased some "$9,000 of them of BUELL for my hotel property. Before "the injunction suit I received $3,000 of them, numbered "between 1 and 8, with coupons. My recollection is that "among the numbers of the bonds taken by me of BUELL, "after the injunction, are," [the number of those sued on are here given, except Nos. 1, 5 and 7.] "These last "bonds, (i. e., all except 1, 5 and 7,) were taken by me "after the decree of the Circuit Court dissolving the in-"junction—on that or the next day." [The case was appealed to the Supreme Court instanter, upon the rendition of the Circuit Court decree, as the Record shows, at page 55.] The other bonds and coupons in controversy, (Nos. 1, 5 and 7,) I received before the injunction. I *understand*

" Caleb P. Marsh is the owner of these bonds. *I sold* " *them to him*, some three years ago, *for 66⅔ cents on the* " *dollar, to be paid me when the money was made on the* " *bonds, or collected. I have received no portion of the* " *pay.* I sold him, as stated, the bonds and coupons. He " gave me no note, but *gave an obligation in writing to* " *pay the 66⅔ cents* WHEN COLLECTED. I delivered the " bonds and coupons to his brother, of the firm of Skinner " & Marsh, directly after the bargain was made. *The* " *bargain was made with said Marsh, who told me he was* " *agent and attorney of his brother.* It was understood at " the time of this bargain, that they would be sued on in " some court. *They are the bonds in controversy in this* " *suit.* I made no bargain with Caleb P. Marsh, per" sonally." * * " *It was understood at the time of* " *making the bargain, that payment of the bonds would be* " *resisted.* I told Marsh that the people of Fulton County " were willing to pay them, but that there were a few par" ties who controlled the county, that were not. And I " told him that was the reason they were not paid." * * " There had been some previous talk about the refusal of " the County to pay. At the time of the bargain the ob" ligation was signed by the agent of Caleb P. Marsh." * * " I am interested in this suit to the extent of said " 66⅔ cents on the dollar, I suppose."

Verily, the *innocence* of this transaction is quite charming! And yet my learned brothers, who represent the prosecution, are seeking to recover, on behalf of their client, as *an* INNOCENT PURCHASER *for a valuable consideration.* He can recover, if at all, upon no other basis, for *unless he is an innocent purchaser, for value, he is chargeable with all the irregularities*, and hence the case comes to an end at the very outstart; for *the Illinois Supreme Court, in the case referred to in the 21st Ills. R., have decided that the proceedings, down to and including the issuance of these bonds, bristle with fatal irregularities*, apart from the question of *power*—such as, that the change in the enterprise, under the act of 1857, was so radical and fundamental as to release subscribers to the stock, (21st Ills. 371), and that the submission of the "proposition to "vote on two roads at the same time, was not authorized "by law, and is a fraud on the people." (21st Ill. 372–4, inclusive.) Let it not be forgotten that these very bonds in controversy, with $60,000 more claimed under the same vote, were the subject matter of the suit in the Supreme Court of Illinois, referred to, and that that highest tribunal of the State, in passing upon the questions involved, gave construction to the Statutes of the State bearing upon the present case, and especially the act of Feb'y, 1857, under which was organized the said "Central Division of the M. & W. R. R. Co.," and which the Illinois Supreme Court say was "*another and different Company* "*from the one to which the subscription was made*" (*voted.*)

It should be noted here, that Buell and Thompson, (who got the bonds), were both residents of Fulton County before and at the time the bonds were issued by the Clerk, and also after the chancery case of "*The Supervisors of Fulton Conntу* v. *The M. & W. R. R. Co. et al*," was commenced. (See Thompson's evidence, Record, p. 79, and Stipulation, p. 40.) And, therefore, as citizens of the municipality, they were chargeable with notice of all defects and irregularities in respect to the issuing of the bonds. This was the case apart from the pendency of the chancery suit mentioned, but all the more so from the fact of the defects being charged in the bill of complaint in that case, and from the further fact of the extraordinary notoriety of the case. And Thompson testified that he knew of the suit "within a day or two after it was commenced." Record, page 79. [As to the great notoriety of that proceeding, see depositions of Ingersoll, Heald, Stipp, Piersol and DYCKES, Record pp. 77, 79, 83, 86 and 87.] The appeal from the decision of the Circuit Court, dissolving the injunction and dismissing the bill, was taken instanter. (Record, pp. 54 and 55.) These considerations are the more important, because this same THOMPSON informed the plaintiff's agent and attorney, with whom he made the contract related above, that the "payment of the bonds "would be resisted," and of the "refusal of the County "to pay," &c.

The attention of the Court is also particularly called to the fact that these bonds [see one of the *originals*, attached to the manuscript Record, at page 31,] are *not fair on their face*, but bear the marks of haste and suspicion; and to the further and important fact, that when the arrangement between THOMPSON and plaintiff's agent or attorney was made, (which looks very like a convenient bargain for lawyers' services, as before suggested, and to secure some one to play "innocent purchaser,")—when this arrangement was made, most of the *coupons were long over-due*, and the bonds nearly due, which *alone* was sufficient to put even an "*innocent*" of the speculators and stock-jobbers upon inquiry. But if the long over-due coupons and suspicious appearance of the bonds were not enough to open the eyes of the plaintiff's agent, (who was also one of his attorneys of record below,) his interview with THOMPSON, and the latter's readiness to sell what purported to be County bonds almost due, and coupons long past-due, "*for 66⅔ cents on the dollar, to be paid when "the money was made on the bonds*," were certainly enough to soil the "innocence" of the most verdant bond-dealer that ever bought a law-suit. And the plaintiff, being thus put upon inquiry, had only to go to the Fulton County records to discover not only the entire absence of all power—*even in the Board of Supervisors*, much less in the Clerk—to issue the bonds, but also all the "irregularities" hereinafter referred to ; and moreover to learn of not only the repeated disclaimers of all liability upon the bonds and coupons, and uniform resistance af all attempts to collect or enforce them from the very first meeting of the Board after they were issued by the Clerk, but also that the transfer of these very bonds had been and still remained enjoined ; [for the appeal to the Supreme Court, from the final decree dissolving the injunction and dismissing the bill, revived the injunction, as will be established beyond all question, by authorities referred to in an after part of this argument; and the reversal by the Supreme Court of that decree left the injunction in full force, as it still remains.] As to facts above referred to, see Record, pages 68, 43, 44, 45, 47, 48, 49, 53, 54, 55, 71, 90 and 92. Verily, what "*innocence!*"

III. IRREGULARITIES.

In addition to the two irregularities above referred to as having been passed upon by the Supreme Court of Illinois, the evidence conclusively shows that the condition of the vote for the county to subscribe the $75,000 to the M. & W. R. R. Co., (*i. e.* that $700,000 should be first subscribed to the capital stock and five per cent. paid in,) was never complied with, (Record, page 91,) and that a large number of subscribers to the stock, who were such at the time of the vote of the county and afterwards, were, before these bonds were issued by the Clerk, released from their subscriptions by the original M. & W. R. R. Co.

[For a single instance of the release of about $100,000, see stipulation, at page 38 of the Record; and for a resolution of the Mississippi and Wabash R. R. Co., adopted in June, 1856, "that stock subscribed by persons residing in "Fulton County should not be collected unless the Directors residing in said County should desire the same," &c., see Record, page 35. And that those Directors did not, from that time onward, ever desire it, see STIPP's testimony, Record, page 88. Nor was the other condition of the resolution ever complied with by said M. & W. R. R. Co. That Company never put "the portion of the "Road lying in said County under contract for construction."] That *no subscription was ever made on behalf of the county on the books of the M. & W. R. R. Co.*, [the subscription made was on the books of the "*Central Division*" Corporation,] is shown by stipulation, (Record, pp. 43 and 44,) and by PIERSOL's and INGERSOLL's testimony. (Record, pp. 65, 66 and 73.) Nor were any certificates of stock ever delivered to Fulton County. [See testimony of INGERSOLL and PIERSOL, pp. 77 and 86 of Record, and admission, in body, of DYCKES' deposition, p. 87, Record.] And hence, by reason of these and the other irregularities named, even the original or "Mississippi "and Wabash R. R. Company had no right to the bonds under any circumstances; and the plaintiff, not being an innocent purchaser for value, and having been put on inquiry before his bargain, (see THOMPSON's testimony, *ante*,) can, in no event, take any greater right than the original parties.

It is proper to add, in this connection, that there was no meeting of the Board of Directors of the M. & W. R. R. Co. from June, 1856, to November, 1858, (See Record,

p. 39,—stipulation and Stipp's testimony, p. 83,) and that *during all that time the project of that road was considered abandoned*. (See Stipp's testimony, p. 82 of the Record, also testimony of Amos C. Babcock and others, Record, p. 91.) It was during this abandonment that the "Central Division" corporation breathed the breath of life and undertook to swallow these bonds and coupons for nourishment. It is worthy of note, also, that there was no election of directors of the M. & W. R. R. Co. from 1853 to 1859. (Stipp's deposition, Record, p. 83.)

IV. Consolidation.

There is some evidence in the case showing that the original Mississippi & Wabash R. R. Co. has recently been consolidated with the Toledo, Peoria and Warsaw Railway Company, under the name of the latter organization, and that the consolidated company has (since the commencement of this suit, which was brought February 22, 1868,—Record, p. 2.) built a railroad through Fulton County, on substantially the line of the old M. & W. R. R. in that county, and on to Warsaw westward, and connecting at Peoria with a road running eastward, forming a continuous line through the State. But, *quid ergo?* We are not told how these facts, accomplished in 1865 and 1868, (see Krugger's testimony, Record, p. 84,) authorized the County Clerk to issue County bonds, *in* 1857, to a totally different (and 60 mile) corporation, namely, the "*Central Division* of the M. & W. R. R. Co." It is believed that the learned counsel for plaintiff in error will be somewhat puzzled to explain how, if the bonds were void when they were issued in 1857, they can be made good and binding by any subsequent acts of either or all three of the railroad companies named, more especially by acts consummated after suit brought on the bonds. But this flank movement appears all the more absurd when we come to consider the fact that the charter of the Mississippi & Wabash R. R. Co. (see Private Laws of Illinois of 1853, page 73,) required the road to be built from Warsaw, on the Mississippi river, "on the most eligible route, eastwardly, *by the City of* "*Bloomington*, in McLean County, to the east line of the "State," together with the other fact that *the line* of the consolidated Toledo, Peoria & Warsaw Railway Company *does not run within* 16 *or* 18 *miles of Bloomington*. (See INGERSOLL'S and KRUGER'S testimony, pp. 77 and 85 of Record.) It appears, from the stipulation on page 39 and 40 of the Record, that, in 1862, Fulton County acquired a railroad outlet, by way of Yates City, Peoria and Galesburg, to Chicago, Burlington, Quincy, &c.

V. RATIFICATION.

It appears in evidence that the *Treasurer* of Fulton County paid the interest on bonds 1, 2, 5, 6, 7, 8 and 15 for 1858, and on bond 15 for 1859. (See stipulation, page 44 of the Record.) The stipulation shows that these bonds were paid out to BUELL & CO., or to JAMES M. THOMPSON, by the Commissioners of the "Central Division" before the filing of the bill in chancery by Fulton County, above referred to, and the issuing of the injuction in that case. The plaintiff has also taken the trouble to prove that the County *Treasurer's* "Register of Railroad bonds," &c., seemingly shows the payment of the interest on a bond numbered 15 "issued to Miss. and Wab. R. R. Co.,"—*not* to the "Central Division of the M. & R. R. Co."—for the year 1858 to 1867, inclusive, and also the principal of said bond 15. (See S. P. SHOPE's deposition, Record, pp. 67, 68 and 72.) The same exhibit referred to by SHOPE, (Rec. p. 72,) shows that there were $710, principal and interest, paid on said bond 15, "by order of the Board of Super-"visors at its February Term, 1866," and that opposite the bond 20 entry, the following words occur: "This "bond and coupons (ten in number) surrendered by C. L. "HIGBEE and canceled as per compromise as to this bond "and No. 15, per order of Supervisors, February Term, "1866." It was proven on the trial (see JUDD's testimony, Record, pp. 89 and 90,) that the entries on the Treasurer's book, referred to, as to the principal of bond 15 and the interest for 1860 to 1867, inclusive, were made after the settlement between Judge C. L. HIGBEE and the Board of Supervisors at the February session, 1866; and it was also proven on the trial (see JUDD's testimony,) that the Board of Supervisors compromised with Judge HIGBEE as to bonds 15 and 20, and the interest coupons, they paying bond 15 and interest coupons, on his surrendering bond 20 and coupons; the resolutions of the Board, in respect to the matter, reciting that the settlement was a compromise of a pending difference between the Board and Judge HIGBEE in regard to the bonds and coupons held by him, and expressly denying any and all liability on any of the bonds issued by the Clerk to the "Central Division of the M. & W. R. R. Co.," and disclaiming any recognition or ratification of any of said bonds. (For the resolutions to which reference is made, see Record, page 90.) These resolutions constitute the action referred to in the Record, at page 53, under the heading of "Order at meeting, February term, 1866." Yet, in the face of all this, my opposing brothers, at the foot of page 23 of their printed Argument, have the coolness to say, without any modification or explanation, that "September, 1865, the Board pay two "of the bonds at a discount," and refer to page 53 of the Record. (They mean, of course, "February 1866." The Record contains no evidence as to any meeting of the Board in September, 1865.) Had this assertion been thus made by lawyers of less character and standing than my distinguished opponents, I should have regarded it as a deliberate attempt to gouge and mislead; but, under the circumstances, it will be more charitable to suppose that my opposing brothers don't comprehend the *facts* in their case. And with the same inexcusable want of knowledge of the facts in the case, or else from a want of proper regard for *fair dealing* in the discussion of the present cause before this august tribunal, my opponents, on page 22 of their Argument, make a statement which is calculated to mislead the Court into the impression that interest was paid on one of these bonds "from 1858 to 1867." The bond referred to is bond 15, embraced in the compromise with Judge HIGBEE; and the whole transaction is explained by a stipulation (Record, p. 44,) and JUDD's testimony before referred to, and the resolutions passed by the Board of Supervisors, also before referred to, (Record, pp. 89 and 90,) and is manifest even from the exhibit to which reference is made in SHOPE's deposition. (Record, page 72.)

Would $500 principal and $210 interest have been paid on bond 15, in February, 1866, if the interest on the bond from 1860 to 1867, inclusive, had been paid from year to year? And with what grace can the wily counsel attempt to dodge the positive evidence contained in their own Exhibit, (SHOPE's, Record, p. 72,) that the impression their course is calculated to create has not the *shadow of truth* in it? For that very exhibit shows on its face that the whole transaction was a "compromise as to" bonds 15 and 20, and their coupons, "per order of Supervisors, February term, '66 More than all this, the solemn stipulation of the parties (Record, p. 44,) shows upon what bonds, and for what years, interest *was paid* by the Treasurer; and it contains no hint that any interest was paid on any bond after 1859.

And again:—If the stipulation, and JUDD's testimony, and the resolutions of the Board of Supervisors are all to be ignored by the Court, (as the plaintiff's counsel, in their sly craftiness, would seem to desire,) and Mr. SHOPE's evidence and exhibit alone relied upon, *then* my artful opponents will find themselves *without any evidence whatever that any interest was ever paid* on any or either of the bonds issued by the Clerk to the "*Central Division*" corporation (even by the *Treasurer;*) for Mr. SHOPE's testimony and exhibit show that the *Treasurer's Register* contained memorandums as to payments *only* on bonds "*issued to Miss. & Wab. R. R. Co.*" and *not* on bonds issued to the "Central Division" corporation. (See Record, p. 72.)

It will he observed that bonds 1, 2, 5, 6, 7, 8 and 15, on which interest was paid by the Treasurer as stated (not by the County, for the Treasurer had no authority to pay), were transferred by the Commissioners of the "Central "Division" before the injunction suit was commenced by Fulton County (Record, p. 44), and that of these, only bonds 1, 5 and 7 are involved in this suit. It will be observed, also, that the interest on bond 15 had been paid by the Treasurer for two years (1858 and 1859), and on this bond alone had interest been paid for more than one year.

These facts probably indicate some of the reasons which influenced the Board of Supervisors to compromise with Judge HIGBEE, in view of the "threatened suit on said "bonds 15 and 20." (Rec., p. 90.) And it will be noticed, also, that *the payment by the Treasurer of these interest coupons* (except on the Higbee bond 15, on compromise as explained,) *was never authorized or recognized by the Board of Supervisors.* (See admission, Record, p. 90.) The depositions of PIERSOL, DYCKES and STIPP (Record, pp. 86, 87 and 88), taken together with the fact of the want of any reference whatever in the proceedings of the Board to the payment of interest on the bonds, and the further fact mentioned of the absence of any authority granted to the Treasurer to pay interest on them, show clearly that, when action was taken on the Treasurer's accounts, *the payment of these interest coupons was not reported to or known by the Board.* The Finance Committee only reported as to the Treasurer's accounts, that they found them correct. (Record, pp. 87 and 88.) The details of the accounts the Board never knew anything of. But had the Board of Supervisors recognized the payment, they might well have done it to save the Treasurer from loss, or even under a mistaken idea of liability on the bonds transferred by the "Central Division" Commissioners *before* the injunction suit was brought, without any ratification or intended ratification of the bonds, even if it be conceded (which is not) that the Board had the *power* to ratify and give life to the unauthorized and void act of the Clerk in issuing the bonds.

The plaintiff has also shown by Mr. SHOPE's deposition (Record, p. 69), and by the action of the Board of Supervisors, (Record, p. 54,) that a vote was had allowing the

PERKIN's bonds (Nos. 2 and 6—*not in suit.*) The records of the Board (Record, p. 54) show also that "a majority "of said finance committee reported against the payment "of the said bonds and coupons; and that on the morn-"ing of the next day (14th September) the Board of "Supervisors reconsidered the above vote, and, on final "vote, refused to pay said bonds or coupons." And SHOPE's deposition (Record, p. 71) also proves that on the morning after the allowance of the bonds, *the vote was reconsidered by the Board* "*and thereupon they refused to* "*pay or allow said bonds or coupons.*

In view of these undisputed facts, my opponents must have queer notions of *fairness* in dealing with truths, and *whole* truths, if I am to judge from their manner of treating the matter. At the top of page 24 of their Argument, they say:

> "September, 1866, the Board order payment of two "more of the bonds *in full*, upon recommendation of "finance committee, that "*they entertained no doubt that* "'*they ought to be paid*,' and they were surrendered."
>
> "The next day the Board, by order, refused to pay the "bonds."

When lawyers, of the great learning and ability that my opposing brothers are conceded to possess, are driven to this method of sly manipulation, it must be manifest that they have no confidence in their case, unless the facts, as they really exist, can in some way or other be clouded over so that they may not be fully disclosed to the Court.

Several orders and steps by the Board of Supervisors, in regard to providing for the interest on railroad bonds, are referred to in the proofs (Record, pp. 48, 49 and 50.)

But these proceedings had no reference whatever to any interest on the bonds issued by the Clerk to the "Central "Division" corporation as aforesaid. The stipulation given at page 30 of the Record shows that, from 1855 to 1859, the county voted subscriptions and issued bonds to to the Peoria & Hannibal R. R. Co. and the Jacksonville & Savannah R. R. Co., to the amount of $300,000. It was the interest accruing on these bonds that the proceedings referred to had reference.

A *committee* of the Board reported at the September session, 1858, "that $315 will be required to pay interest "on $4,500 (should be $3,500) issued to the M. & W. R. "R. Co., and disposed of before any injunction writ was "served on said company" (Record, pp. 49 and 50,) *but the Board never took any action whatever upon the report*, nor did they ever in any way authorize or recognize the payment of any interest on any of the bonds issued by the Clerk, except on bond 15, under the compromise with Higbee, as before stated. Nor, *had* action been taken, could the fact have had any bearing on the bonds and coupons in controversy, even conceding power in the Supervisors to act in the matter; for the reference here is to bonds issued to the M. & W. R. R. Co., whereas these bonds and coupons in controversy were issued to the "Central Division," &c., another and different company.

Some stress seems to be laid by my learned opponents upon the fact that on September 16th, 1857, (a few days after the Clerk issued the bonds,) the Board of Supervisors appointed "agents to represent the interests of the county" in the Mississippi & Wabash R. R. Co. [Record p. 48.] What comfort they can derive from that circumstance is beyond my ability to discover, especially inasmuch as the first act of the agents, in representing "the interests of the county," was to institute, a few days thereafter, (Oct. 9, 1857,) the chancery proceeding above referred to, and obtain an injunction against the M. & W. R. R. Co." the "Central Division of the M. & W. R. R. Co." and other parties charged to have been concerned in the frauds set forth in the bill. [Record pp. 46 and 47.] These "agents" never did anything in "representing the interests of the county" in respect to the M. & W. R. R. Co., or the "Central Division" corporation save only to resist the further issuing of bonds by the Clerk, and to prosecute to a successful issue, the suit referred to on behalf, and with the active concurrence, of the Board of Supervisors. *And the Board, from that day to this, have not only done nothing by which to recognize the County as a stockholder in either the original company or in the "Central Division" company, but have never ceased, whenever opportunity offered, to resist the payment of both principal and interest of the bonds issued by the Clerk to the said "Central Division" corporation*, as the evidence abundantly shows. References to some steps in the direction indicated will be found on pages 68, 43, 44, 45, 47, 48, 49, 53, 54, 55, 71, 90 and 92 of the Record. At the last page referred to it will be seen that there have been two prior trials involving these bonds and coupons, in which the county successfully resisted a recovery upon the same.

In referring to the resolution of the Board of Supervisors of Sept. 16, 1857, providing for the appointment of agents to "represent the interests of the County," &c., in three railroad companies, (the M. & W. R. R. Co. among them,) the plaintiff's counsel, at pages 22 and 23 of their Argument, play upon the words "as a stockholder" used in the resolution. Suppose the County *was* "a stockholder" in the M. & W. R. R. Co., that circumstance would not make it "a stockholder" in the "Central Division" corporation. But the County was *not* "a stockholder" in either the the M. & W. R. R. Co., or the "Central Division" corpooation. No vote had ever been had in favor of the latter Company, nor had any authority been given the Clerk, even by the Board of Supervisors, to issue bonds to the little up-start concern; and no subscription had ever been made or bonds issued to the original or M. & W. R. R. Company. The words "as a stockholder" were carelessly used, and were undoubtedly intended to refer to the other two companies mentioned in the resolution, and to whose capital stock they had in reality subscribed, [See Record, p. 39.] But in any event, a County cannot be made responsible for $75,000, voted on conditions, &c., simply by *its agents* (the Supervisors) *declaring* the County "a stockholder."

Upon the case, thus stated, I submit the following propositions of

LAW APPLIED TO THE FACTS:

I.

THE BONDS NOT ISSUED BY SUPERVISORS.—NO VOTE.—NO POWER.

(1.)—The Board of Supervisors of Fulton County neither issued nor authorized the issue of the bonds to the "Central Division" corporation. It was the act of the *Clerk alone*, done under the mistaken idea that the act of 1857, amending the charter of the M. & W. R. R. Co., and providing for the creation of three small corporations, authorized the issue to be made to the "Central Division" company. The *signing* of the bonds *by the Clerk* was not the act of the County, nor of the Board of Supervisors. When the Board *orders or authorizes* a particular party to sign bonds or other instruments, such party, in signing, becomes merely the instrument by which the action of the Board is manifested. *Clarke* v. *Hancock Co.*, 27 Ill., 308–9.

But had the bonds been issued to said "Central Division" by or under the authority of the Board of Supervisors, they would, nevertheless, have been *void*, even in the hands of innocent purchasers, because there was no authority—*power*—even in the Board of Supervisors, to issue the bonds and coupons. *No vote was ever taken for any subscription to the "Central Division"* corporation; and if, for the sake of argument, we treat the bonds as issued under the direction of the Board of Supervisors, yet the distinction between an act performed *without authority*, or in violation of law, and an act defectively or irregularly performed by officers acting *under authority* and *having power*, is conclusive of this case. This distinction is discussed, and the dividing line clearly drawn, in the following cases:—☞ *Marshall Co.* v. *Cook*, 38 Ill., 44, and *Rogers* v. *Burlington*, 3 Wallace, 669, (dissenting opinion of Mr. Justice FIELD, concurred in by Ch. J. CHASE and Justices GRIER and MILLER; *Schuyler Co.* v. *People*, 25 Ill., 181; *Hancock Co.* v. *Clarke*, 27 Ill., 305; *Hayne* v. *Covington*, 13 Smedes & Marshall, (Miss.) 408.

I am aware that in this Court *Marshall Co.* v. *Schenck*, 5 Wallace, 772, has overruled the doctrine (maintained in *Marshall Co.* v. *Cook* and in *Schuyler Co.* v. *The People*, above referred to,) that, an election on a proposition to subscribe for stock in a railroad company having been ordered by the *wrong authority*, bonds issued in pursuance of an affirmative vote are void—this Court holding that the essential fact under the Statute (Gross' Statutes, 1868, page 547, § 4; also page 3 of plaintiff's Argument,) conferring *power* upon the *agents* of the county in the premises, is the *vote* of "a majority of the qualified voters of such county," it not being material whether the election was ordered by the County Judge or the Board of Supervisors when the rights of an innocent purchaser intervene; but the reasoning and rulings of the Illinois Supreme Court in the cases referred to remain unquestioned, save upon the single point named: and I beg your Honors to give a careful perusal to the opinions in those cases—especially that in *The Supervisor of Marshall Co.* v. *Cook*, 38 Ill. 44, which in its discussions of points such as are involved in the present argument, deals blows that must have a crushing effect upon the case of the plaintiff at bar. And I would also ask particular attention to the very able and powerful dissenting opinion of Mr. Justice FIELD, (concurred in by Ch. J. CHASE, and Justices GRIER and MILLER,) in *Rogers* v. *Burlington*, 3d Wallace, 669, which enunciates well-settled principles of law that are of the greatest importance and have a direct bearing in the case under discussion.

(2.)—While insisting upon the fact, (which I beg may not be lost sight of,) that the Board of Supervisors never authorized these bonds to issue to the "Central Division" corporation, I now proceed, nevertheless, to discuss the question of the *power* of even the Supervisors to issue the bonds. This is done in order to meet every theory which my skillful opponents have been able, in the range of possibilities, to invent. And while considering the question of *power*, let the facts before suggested be remembered that the "*Central Division* of the M. & W. R. R. Co., is a separate and distinct corporation from the "Mississippi & Wabash R. R. Co.," and that no vote was ever taken in favor of subscribing to the stock of the "Central Division" company. The decision of the Illinois Supreme Court, [Supervisors of Fulton Co. *v.* M. & W. R. R. Co., et al., 21 Ill., pp. 369, 372, inclusive—Compare with 6 Ind (Porter,) 316, &c.,] holding the "Central Division" company aforesaid, to be a different corporation from the M. & W. R. R. Co., was rendered in construing the Act of 1857, amending the charter of the latter company, in connection with precisely the same facts that are in evidence in this case, except such as have occurred since that decision, and which can have no possible bearing upon the point. In cases involving State laws, the U. S. Courts will follow the adjudications of the highest courts of the State.—*Leffingwell* v. *Warren*, 2 Black, 559; *Mercer Co.* v. *Hackett*, 1 Wallace, 96; *United States* v. *Morrison*, 4 Peters, 124; *Green* v. *Neal*, 6 Peters, 291. "The construction given to "a statute of a State by the highest judicial tribunal of "such State is regarded as a part of the statute, and is as "binding on the courts of the United States as the text." *Leffingwell* v. *Warren*, 2 Black, 603, and cases cited. And this is the case even if the State court adopts new views.

Now, as to the powers that may be exercised by the Board of Supervisors:

"A county cannot subscribe for stock in a public im-"provement unless authorized to do so by the Legislature. "Such a corporation acts wholly under a delegated au-"thority, and can exercise no power which is not, in ex-"press terms or by fair implication, conferred upon it." *Thompson* v. *Lee County*, 3 Wallace, 303.

This being the law, the following statutes of Illinois—

the only ones relating to the subject under discussion—will aid us in ascertaining the extent of the "delegated authority" in the premises:

"The powers of a county as a body politic can *only* be "exercised by the Supervisors thereof, or in pursuance of "a resolution by them adopted." Laws 1851, p. 50, Art. XV., § 4; 2 Purple's Statutes, 1146; re enacted in 1861, Gross' Statutes, 1868, p. 751, Art. XIII. § 4.

"*No County*, under this organization," (township organization—which has existed in Fulton County since 1852—see Record, p. 58,) "*shall possess or exercise any* "*corporate powers except such as are enumerated in this* "*act, or shall be specially given by law*, or shall be neces-"sary to the exercise of the powers so enumerated or "given." Laws 1851, p. 50, Art. XV. § 2; 2 Purple's Statutes, p. 1146; re-enacted in 1861, Gross' Statutes, 1868, p. 751, Art. XIII. § 2.

"Whenever the citizens of any city or county in this "State are desirous that said city or county should sub-"scribe for stock in any railroad company already organ-"ized or incorporated, or hereafter to be organized or "incorporated, under any law of this State, such city or "county may, and are hereby authorized to purchase or "subscribe for shares of the capital stock in any such com-"pany, in any sum not exceeding one hundred thousand "dollars for each of such cities or counties," &c. Act of 1849, Session Laws, (2d Session,) p. 28, § 1. 2 Purple, p. 1072. Plaintiff's Argument, p. 2, § 1.

"*No subscription shall be made*, or purchase, *or bond* "*issued by any county* or city under the provisions of this "Act, whereby any debt shall be created," * * * "to pay any such subscription, *unless a majority of the* "*qualified voters of such county or city* * * * * * *shall vote for the same*," &c. Session Laws, 1849, (2d Sess.,) p. 28, § 4. 2 Purple, 1073. Plaintiff's Argument, p. 3, § 4.

The notices of election "*must specify the company in* "*which the stock is proposed to be subscribed*, the amount "which it is proposed to take," &c. Laws, 1849, p. 28, § 4. 2 Purple, 1073. Plaintiff's Argument, p. 3, § 4. And the vote must be to a *specified company*. *Supervisors* v. *Schenck*, 5 Wallace, 777; *Fulton Co.* v. *M. & W. R. R. Co.*, 21 Ill., 373.

In this connection I submit to your Honors the following authorities:

> "The *authority* of counties (in Illinois), *to purchase or* "*subscribe for railroad shares, or to issue bonds, is subject* "*to certain conditions* or regulations, *one of which is that* "*a majority of the qualified voters of the county must first* "*vote for such subscription or purchase.*" *Supervisors* v. *Schenck*, 5 Wallace, 777.
>
> "If the *Charter*" * * "authorize a borrowing of "money upon *a vote of the citizens*, the *money cannot be* "*borrowed in any other way*. In all such cases the *mode* "becomes the *measure* of the *power*." *Rogers* v. *Burlington*, 3 Wallace, 669, and cases cited,—dissenting opinion of Ch. Justice CHASE and Justices FIELD, GRIER and MILLER; *Head & Amory* v. *Providence Ins. Co.*, 2 Cranch, 169.

In the last case above cited, Mr. Ch. Justice MARSHALL, in delivering the opinion of the Court, says:

> "It is a general rule that a corporation can only act "in the manner prescribed by law. *When its agents do* "*not clothe their proceedings with those solemnities which* "*are required by the incorporating act, to enable them to* "*bind the company*, the informality of the transaction" * * "is itself conducive to the opinion, that such act "was rather considered as manifesting the terms on which "they were willing to bind the company" * * "*than* "*as a contract obligatory* on both parties."
>
> "Without ascribing to this body, which, in its corporate capacity is the mere creature of the act to which "it owes its existence, all the qualities and disabilities "annexed by the common law to ancient institutions of "this sort, it may correctly be said to be precisely what "the incorporating act has made it, to derive all its pow-

" ers from that act, and to be *capable of exerting its facul-*
" *ties only in the manner which that act authorizes.*"

In drawing a distinction between the acts of individuals and those of corporations, the learned Judge says:

> " An individual has an original capacity to contract and " bind himself in such manner as he pleases. For the " general security of society, however, from frauds and " perjuries, this general power is restricted, and he is " disabled from making certain contracts by parol. This " disabling act has received constructions which take out " of its operation several cases not within the mischief, " but which might very possibly be deemed within the " strict letter of the law. He who acts by another acts " for himself; he who authorizes another to make a " writing for him makes it himself. *But with these bodies* " *which have only a legal existence, it is otherwise. The* " *act of incorporation is, to them, an enabling act; it gives* " *them all the power they possess; it enables them to con-* " *tract, and when it prescribes to them a mode of contract-* " *ing,* THEY MUST OBSERVE THAT MODE OR THE INSTRUMENT " NO MORE CREATES A CONTRACT THAN IF THE BODY HAD " NEVER BEEN INCORPORATED." *Head & Amory* v. *Providence Ins. Co.*, 2 Cranch, 168–9.

See also to the same purport:

McCracken v. *City of San Francisco*, 16 *Cal.*, 619.

The Farmers' Loan & Trust Co. v. *Carroll*, 5 Barbour, 649

N. Y. Fire Ins. Co. v. *Ely*, 5 Connecticut, 568.

Also opinion of majority of the Court in

Rogers v. *Burlington*, 3 Wallace, 663.

An act of the Missouri Legislature authorized the city of St. Louis to subscribe stock to the O. & M. R. R. Co., provided a majority of the voters were in favor of it.

Held, that the question *must be submitted;* that it is *not directory*, but *imperative, and is a condition to the right to subscribe the stock. St. Louis* v. *Alexander*, 23 Mo. 483. See especially pp. 511, 512, 513, 519, 520.

Bonds issued by county officers are *void*, where the law prohibits subscription save on conditions not fulfilled. *Aspinwall* v. *Commissioners Daviess Co.*, 22 Howard, 374, &c.; 12 B. Monroe, 144.

I venture now to suggest, that it must be manifest to your Honors, from what precedes, that the bonds (even if treated as issued under the direction of the Board of Supervisors,) were issued to the "Central Division" corporation, not only without authority—without any *power*—but also *in violation of the positive prohibition of the fourth section of the very statute* which alone gave the county the right to subscribe for stock in any event. (2 Purple's Statutes, p. 1073; Plaintiff's Argument, p. 3, § 4.) "*No subscription shall be made*," says the statute, "*or* "*bond issued, by any county or city*" * * "to pay any "such subscription, *unless a majority of the qualified* "*voters of such county or city*" * * "*shall vote for* "*the same*."

Yet these bonds *were* issued by the Clerk, without any pretence of a "vote for the same." And the law is well settled, that *the holder of an instrument prohibited by statute*, although negotiated before its maturity, and *although he may be an innocent purchaser* for a valuable consideration, *is not protected. Bailey* v. *Taber*, 5 Mass., 286: *Marshall Co.* v. *Cook*, 38 Ill., 54, 57.

3. In every case in which this Court has indulged in any presumptions in favor of a *proper exercise* of power to

subscribe for railroad stock and issue bonds, the *power* itself *in reality existed*, or at least, nothing was shown to indicate that it did not exist, while at the same time "the bonds, on their face, imported a *compliance with the law* under which they were issued," and were held by "*innocent purchasers*." The following extracts go to the *fullest extent* of the doctrine urged against us:

> "When the corporation has *power* to issue negotiable "securities, the decision of this Court is, that the *bona fide* "holder has a right to presume they were issued under the "circumstances which give the requisite authority, and "they are no more liable to be impeached for any *infirmity* in the hands of *such a holder* than *any other* "*commercial paper*."

* * * * * * * * *

> "It is settled law that a negotiable security of a corporation which, *upon its face*, appears to have been duly "issued by such corporation, *and in conformity with the* "*provisions rf its charter*, is valid in the hands of a *bona* "*fide* holder thereof, *without notice*." *Supervisors* v. *Schenck*, 5 Wallace, 784.

The point at issue in the above case, (which came up from Illinois,) was whether the *notice of election* given by the "County Court," and not by the "Board of Supervisors," was good in the matter of acquiring *power* in the county authorities to issue bonds. The bonds were in the hands of an *innocent purchaser* and *on their face* recited a compliance with the law. The Court held that, under these circumstances, and inasmuch as "*a majority of the qualified voters*" of the County *voted for the subscription*, the power was conferred upon the officers to subscribe for the stock and issue the bonds. They held that the *essential condition* of the *power* was the *vote* of the citizens, notwithstanding the *notice of election* would have been more properly given by the Board of Supervisors. This ruling, applied to the case at bar, is fatal to the plaintiff's claim, and will sustain the judgment of the Court below. Great weight is also given by the Court, in the above case, to the fact that the *Board of Supervisors* of Marshall County *paid interest on the bonds in controversy* in that suit *for nine years*, with the acquiescence of the citizens, and without any objection inimical to the bonds or any proceedings adverse to them, either by the County authorities or any tax payer; and to the further fact that the stock had been subscribed and certificates of stock received by the County. *That case has not a single fact*, upon which the liability was held or argued, *that runs parallel with any fact in the case at bar.* In the case under discussion before your Honors, there has been (1) no vote; (2) no subscription for the stock; (3) no certificates of stock delivered to the county; (4) no interest paid by the Board of Supervisors; (5) no acquiescence in, or recognition of the act of the Clerk in issuing the bonds; (6) no laches on the part of either the Board of Supervisors or the citizens; (7) and there is no innocent purchaser or *bona fide* holder; (8) nor are the bonds fair on their face; (9) nor have they any recitals, either of law or fact, importing compliance with the law under which alone the bonds of the County could be issued. In all these particulars, (as well as in the matters of the double submission, the non-compliance with conditions as to the original corporation, and the making of a fundamental change from the original project,) the present case differs from that reported in the 5th of Wallace.

Even in that case, which is the strongest that can be cited against us, it will be observed that the essentials shown by the extracts quoted, on which the liability was held to attach, were, "*power* to issue" the bonds,—the bonds *upon their face* appearing to have been "*duly issued* " by the corporation, *in conformity with the provisions of* " *its charter*,"—and a "*bona fide* holder, *without notice*." These essentials existing, the Court remark that the bonds " are no more liable to be impeached for any *infirmity* " (irregularity) in the hands of *such a holder* than *any other* " *commercial paper*." But, of course, the innocent holder of instruments purporting to be county bonds has thrown around him no higher safeguards, and is entitled to no greater protection than the *bona fide* purchaser of "any other commercial paper." And for what may "any other commercial paper" be "impeached?" I answer in the words of the Supreme Court of Illinois, (not because any authority is needed to sustain the proposition, but because the points are put in terse and comprehensive language,) that:

> " A forged note, a note executed by a person assuming " without authority to act as the agent of another, and a " note altered in a material part, although they may be " assigned or negotiated, are not by that means rendered " binding, but the same defence may be made in the " hands of the assignee as in the hands of the original " holder. Neither does the negotiation of a note with " notice of the defence, or of such circumstances as charge " the assignee, cut off a defence in his hands."—*Marshall Co.* v. *Cook*, 38 Ill., 55.

The bonds in the present case were "executed by a " person assuming without authority to act as the agent" of the county, and are no more binding in the hands of an innocent purchaser than a forged note would be.

☞Now, this Court, (which has gone to the utmost limit in sustaining bonds in the hands of innocent purchasers,) has never intended to hold, and has never held, that simply because a statute gives county authorities the power to issue the bonds of the county *upon certain conditions*, an innocent purchaser has, therefore, the right to presume that *those conditions* have been complied with whenever the bonds, sealed with the county seal and issued by a county officer, recite falsely on their face that the conditions of power *have* been complied with.

Chief Justice CHASE, and Justices FIELD, GRIER and MILLER, do not clash with the majority of the Court when they declare, in their dissenting opinion, in *Rogers* v. *Burlington*, 3 Wallace, 672, that:

> Where there is a want of power, "no formality of execution, and no extent of recitals could give validity to "instruments thus issued. The public agents" (*i. e.* of the corporation) "could not cure the inherent defect in their "action arising from want of power, by any amount of "representation that they had the requisite athority."

Suppose a dishonest County Clerk should sign, seal and issue handsomely engraved bonds reciting a vote of the citiizens of his county and a full compliance with the laws authorizing such bonds to issue, *when in fact there had been no vote*, nor any action whatever authorizing the issue of such bonds, *would any court* of *law* or *justice*, in all this broad land, *hold that an innocent purchaser could enforce the bonds against the county?* Nonsense! Such a ruling would be contrary to every principle of law and reason, would open wide the floodgates of corruption and crime, would leave corporations without any safeguards, and involve not a few in turmoil and ruin. And yet, the argument made by my distinguished opponents in effect goes still *beyond* such a monstrous doctrine, and insists in this case (where there are no recitals in the bonds of compliance with the law—where there has been no vote—where there was no authority in either the Supervisors or the Clerk—and where there is no innocent purchaser,) that because these bonds—issued by *somebody* in the name of Fulton County—have been, by somebody, sent on an exploring expedition after a *bona fide* purchaser "for value," to be paid out of the proceeds "*when collected*," therefore the County must be made to pay them! And it was urged in the Court below, that the *tendency* of the decisions of this Honorable Court, in bond cases, is in the direction of establishing liability on these bonds, and of maintaining "commercial faith." I am not able to perceive how "commercial faith" can be advanced either by compelling a man to pay a note forged upon him, or by compelling a county to pay bonds issued in its name without authority! Nor do I agree that the tendency of the decisions can give any encouragement to the hopes of my opponents. On the contrary, not only the tendency but the positive utterance of these decisions, if I comprehend them, is that even a good-faith purchaser, for value, must look not only to the *law* but *also* to the *power-giving acts* under the law, though he is *not* called upon to see to it that there were no *infirmities* or *irregularities* in the *details* of the proceedings. By *the law* he will find that "*whenever the citizens* of any County *are desirous* that said County should subscribe for stock," the subscription may be made and bonds issued, *provided* "*a majority* of the qualified voters of such County *vote for the same.*" This *vote* is the method pointed out to ascertain whether or not the citizens are "desirous," &c. The County records are *public records*, and open to the public, and a proposed purchaser can very readily look to them, and he *must* look to them, at his peril, to ascertain whether the corporation has acted—whether the "citizens were desirous,"—whether "a majority of the qualified voters" gave their assent. This done, he need not inquire whether the election officers were duly sworn, or whether the election, in all its details, was conducted according to the strict letter of the law. In the case of *Comr's of Knox Co.* v. *Aspinwall et al.*, 21 Howard, 545, &c., it is distinctly held that it is not enough to read the statute; *that the law* AND THE ACTS UNDER IT, essential to give power, must be looked to. The case there cited and approved by this Court, decides, in respect to corporations, that "parties "dealing with them are bound to read *the statute and the* "*deed of settlement*," &c.

4. The plaintiff's counsel vouchsafe to inform us (at page 30 of their Argument) that they "need not cite the numerous cases in this Court" upon certain propositions named. Of course they "need not," for the very satisfactory reason that if they should "cite" them, they would afford my distinguished opponents no comfort in this case, but would return to plague the citers. The cases referred to, are undoubtedly the following. Let us examine them and see how they apply:

Mercer Co. v. *Hacket*, 1 Wallace, 83. This case went up from Pennsylvania. The *condition of power*—(recommendation by the grand jury)—*was really complied with.* The Supreme Court so say. The bonds *on their face* imported compliance with the law, &c., "were elegantly en- "graved, with such external indications as were calculated "to arrest the eye, and through it, to inspire confidence," &c. They were "on their face complete and perfect." Their appearance and completeness were dwelt upon by counsel, the reporter and the Court. The commissioners were the parties authorized by law to subscribe stock and issue the bonds on the recommendation of the grand jury. The bonds were signed by the commissioners and attested by the Clerk, and were also in the hands of an *innocent purchaser*, for value. [N. B.—In the case under discussion, the Board of Supervisors were the parties to subscribe the stock and issue the bonds on a recommendation or vote of "a majority of the qualified voters" of the county. But they did not act at all, as to the subscription made, nor as to these bonds issued to the "Central Division" corporation, nor did they authorize the Clerk to act.] In this Mercer County case, (to borrow the language of the Ill. Supreme Court, 38 Ill., 56), "it was *not* a question of *power* to act, but whether the action, defective it might be, was still *in pursuance* of the power."

Gelpcke et al v. *the City of Dubuque*, 1 Wallace, 175. In this case the bonds were *fair on their face;* imported a compliance with the law; and were held by *innocent purchasers*. (See opinion.) So far as the record shows, the law authorizing the issue of the bonds had been strictly and fully complied with. The bonds had also been declared valid by a curative act of the legislature. The decision of the Supreme Court in this case holds simply that the constitution of Iowa authorizes the legislature to empower municipal corporations to subscribe for railroad stock. It was a question of constitutional power—nothing more. Mr. Justice MILLER dissents.

Van Hostrup v. *Madison City*, 1 Wallace, 291. In this case the bonds *on their face* showed a compliance with the law; that the necessary petition was had, &c., and they were held by a *bona fide* purchaser for value. (See Opinion, p. 297.)

Meyer v. *The City of Muscatine*, 1 Wallace, 384. The bonds, in this case, were also fair on their face; showed a vote of the citizens and a compliance with the law (p. 386, &c.,) and were held by an innocent purchaser. The Court held (see page 393) that the *power* to act *existing* a mere *irregularity* in taking the vote or *in the exercise* of the power could not be set up *as against an innocent purchaser.* There is no point in the case that at all bears against the defence in the case on argument.

Rogers v. *Burlington*, 3 Wallace, 654. In this case the bonds were fair on their face; declared, in the body of the instruments, that they were issued in pursuance of ordinance 44, &c.; contained a copy of the ordinance printed at large on their backs, and were held by a "*bona fide holder* for value." The question of power under the charter arose in the case. The conditions as to power to subscribe where complied with, and the majority of the Court held that the power existed. Chief Justice CHASE, and Justices FIELD, GRIER and MILLER dissented. The dissenting opinion contains many important and undisputed propositions of law applicable to the case before your Honors.

Supervisors v. *Schenck*, 5 Wallace, 784. These bonds, again, were held by an innocent purchaser for value; were fair on their face, and recited a compliance with the law. The *Board of Supervisors* of Marshall County, Ill., paid interest on these bonds for *nine years* before they were sued, and held certificates of stock in exchange for the bonds. The real point decided in this case is, that the *notice of election* given by the "County Court," instead of the "Board of Supervisors," was good, when arising on the bonds in the hands of a *bona fide* purchaser. The

Court held that *the essential fact confering power* was the vote of "a majority of the qualified voters."

Moran et al v. *Commissioners Miami County*, 2 Black, 722. The bonds at issue were "regularly executed by the party having authority to do it," (Opinion, p. 730), were fair on their face; recited facts on their face showing the regular issue; and were held by innocent purchasers for value. [As to what they recited on their face, &c., see Opinion, 730-31-32.] *Irregularities* were charged, and hence the claim was set up that the bonds were void. (p. 729.) The Court held, as stated in the syllabus, that under the circumstances, "as against one who has taken "them in good faith, the county cannot set up the *equities* "which might have been available against the original "payee."

Com'rs. Knox Co. v. *Aspinwall et al.*, 21 Howard, 593. The bonds, in this case, were fair on their face; purported by their own recitals to have been issued in compliance with the statute, (see p. 545;) and were held and sued by innocent purchasers, for value. The Court held that it was too late to raise questions as to the existence or *regularity of the notices of election*, &c., as against *bona fide* purchasers. Judge Daniel dissented. But the Court go further, and hold that all purchasers *must look to the law and acts under the law*, so far as *to determine as to the existence of power*, and that *it is not enough to look to the statute alone.* A case is cited and approved, at page 545, in which it is held, as to corporations, that "parties dealing with them "*are bound to read the statute and the deed of settlement*," &c.

Bissell v. *City of Jeffersonville*, 24 Howard, 287. In this case the bonds on their face recited compliance with the charter; and they were held by an innocent purchaser. The question was raised as to whether three fourths of the legal voters of the city had petitioned for subscription. It was held, that that was for the City Council to decide; and they having decided that a sufficient number had petitioned, and the bonds so reciting *on their face*, it was too late to raise the point *against an innocent holder.*

I have discovered no stronger cases in the books than these last two, especially than that in 21st Howard. I do not see wherein the holdings of the later cases go beyond the doctrine of these.

(5.) Had the Board of Supervisors of Fulton County authorized the subscription of stock to be made and the bonds to be issued to the "Central Division" corporation, instead of to the original company to which it was voted, still the subscription made and bonds issued would have been without authority and void. This Court, in *Bell* v. *Railway Co.*, 4 Wallace, 601, say:

"*A municipal corporation cannot modify or alter the* "*stock subscription voted by the people*, in the absence of "power by the Legislature." And any agreement to do so would be without authority of law and void.

II.

Plaintiff Not an Innocent Purchaser.

The proofs show that plaintiff's agent, (before the consummation of the bargain by which a figure-head plaintiff was secured,) was advised by Thompson of "the refusal of the county to pay the bonds, and that their payment would be resisted;" and they show also that "it was understood they (the bonds) would be sued on in some court," not only so, but that THOMPSSON (who claimed to have sold the bonds to plaintiff's agent) "*received no portion of the pay*," nor any note, but only "an obligation in writing to pay him, THOMPSON "66⅔ cents on the dollar," "*when the money was made on the bonds or collected.*" By referring to one of the *original* bonds sent up with the Record in this case [see Record, page 31] the court will also observe the important fact that these bonds are not *fair on their face*, but were printed on types (which is unusual) and in a slovenly manner, and bear the marks of haste and suspicion. It also appears in evidence that, at the time of the bargain, most of the coupons were long over-due, and that the principal was nearly due; that THOMPSON has resided in Fulton County 22 years, and "knew of the suit of the County against the M. & W. R. R. Co. *et. al.*, within a day or two after it was commenced," and that at the time of the commencement of the suit, as well as before and after, BUEL, (to whom the bonds were first transferred, and from whom THOMPSON got them,) was also a resident of that County. The appeal to the Illinois Supreme Court, from the decision of theCircuit Court, was taken instanter. (Rec. pp. 54, 55.)

(1.) "The rule undoubtedly is, that where a party is "about to receive a bill or note," [and with stronger reasons does it apply in the case of pretended municipal bonds,] "if there are any such suspicious circumstances "accompanying the transaction, or within the knowledge "of the party, as would induce a prudent man to inquire "into the title of the holder or the consideration of the "paper, he shall be bound to make such inquiry, or if he "neglet to do so, he shall hold the bill or note subject to "any equities" (or defences) "which may exist between

" the previous parties to it. In other words, he shall act " in good faith, and not WILLINGLY REMAIN IGNORANT when " it was his duty to inquire into the circumstances and " know the facts."—*Russel* v. *Haddock*, 3 Gilman, 236.

☞ Now, not only is the plaintiff not an "innocent purchaser," by reason of having been advised that the bonds would be resisted, &c., and fully put on his inquiry at the time of the bargain, and also by the fact of the over-due coupons; but, by operation of law, *there can be no " innocent purchaser " when no payment is made.* And this is the law even as against latent equities or interests in real estate—a much stronger case than can possibly arise in regard to county bonds; for, as to the latter, a purchaser can readily gain complete information through the county records, while as to the former he may have no possible source of information. Yet, a party holding land *under a recorded deed*, to defend his title against a claimant under a previous *unrecorded equitable title*, must show that he has an *equitable* as well as the *legal* title; and this must be sustained by proofs, *that he purchased the land in good faith, and* ACTUALLY PAID FOR IT *before notice of the previous equitable title or interest. It is not sufficient even that he may have* SECURED *the payment of the purchase money. Brown et. al.* v. *Welch*, 18 Ill., 343; *Worden et. al.* v. *Williams*, 24 Id., 67; *Storey* v. *Windsor*, 2 Attk., 630; *Bassett* v. *Nasworthy* 2d vol., p't 1, Lead. Eq. Cases, 61, *et seq.*—notes of Hare & Wallace; 1 Story Eq. Juris., 76.

(2.) James M. Thompson is the *real* plaintiff in this case. He swears that he is "interested in this suit to the extent of said 66⅔ cents on a dollar." And the worthy lawyers who represent Thompson will get the other 33⅓ cents, (!) IF Fulton County shall be *forced* by your Honors' judgment to pay the bonds, which I have no fears will ever be the case. THOMPSON, to be sure, is not a party to the record. But then, he is "the power behind the throne." He is the party who made the bargain with plaintiff's agent (one of the attorneys of record in the case below), and told the latter all about the defenses that would be made—about the "refusal of the county to pay" the bonds, and that they "would be resisted," &c. Hence, under the circumstances, the plaintiff is chargable with everything in the matter with which THOMPSON would be. Apart from THOMPSON's actual knowledge as a citizen of the County that no vote was ever taken in favor of the "Central Division;" that the submission and vote, even as to the M. & W. R. R. Co., was coupled with a proposition in favor of another road; and as to other defects and irregularities; apart from this *actual knowledge*, I say, he was chargeable with notice of *all* the defects and irregularities, by operation of law. The citizens of a municipality, as a general rule, are chargeable with notice of all defects in exercising the power granted to the municipal authorities. *Marshall Co.* v. *Cook*, 38 Ill., 54.

And, too, the doctrine of *lis pendens* would apply to him, especially considering the great notoriety of the chancery suit brought by the County for an injunction, &c. That doctrine, in its application to commercial paper in the broad sense in which is is held in *Diamond* v. *Lawrence* Co., 37 Penn., 353, &c., as giving "notice to all the world of all the facts alleged in the pleadings," I do not contend for. That case goes far beyond the current of authority, both English and American; and yet, I think it enunciates a correct rule of less general application—for instance, as clearly applicable to the citizens of the municipality of the venue. Thompson having been a citizen of the county in which the suit was pending, and in which all the parties resided—being the same county in whose name the bonds were issued—and the suit having been of extraordinary notoriety, I contend that the rule applies to him. With this view, and to this extent of application, I quote from the opinion in that case, as follows:

> " It is manifest from this statement that the bond now " in suit was transferred by the Company in contempt of " the authority of this Court. After the service of the " subpœna in the equity suit, the company had no authority, under any pretence whatever, to part with a bond. " Considering the extraordinary notoriety which attended " the equity suit against the Railroad Company, we think " the rule is applicable here without that application. " And according to that rule, the suit was notice to all the " world of all the facts alleged in the pleadings; so that " the plaintiff stands in no better situation for enforcing " the bond against the county than the Company them- " selves would stand." 37 Penn. S. R., 353.

A great number of authorities are cited in the above case in support of the doctrine. *Lis pendens* is held to apply to choses in action as well as to real estate. See also:

2 Leading Cases in Eq. by Hare & Wallace, 123.
Murray v. *Sylburn*, 2 John's Ch. R., 441.
Jackson v. *Ketcham*, 8 John., 479.
Jackson v. *Andrews*, 7 Wend., 152.
Green v. *White*, 7 Blackf., 257.
Adams Equity—note on page 385—not followed altogether in Diamond case.
Watlington v. *Hawley*, 1 Desau., 167.

(3). *The appeal* in the case, (*Board Supervisors* v. *M. & W. R. R. Co. et al.*,) carried the injunction with it. An appeal suspends an order dissolving an injunction.

But the plaintiff's counsel, at page 20 of their Brief and Argument, tell us that the —

> "Appeal from the decree without application to the "Court for, and the granting of an order reviving or con-"tinuing the injunction pending the appeal, would not "have suspended the portion of the decree dissolving the "injunction. This is fully settled."

"It is fully settled" in Illinois just the other way, as I will be able to satisfy this Court.

And on page 21 of their Argument, my opponents boldly assert that—

> "After the dissolution there was no injunction, and "could be none without further action of a court in the "exercise of judicial jurisdiction. The appeal of the party "created no injunction, nor could have more effect than to "suspend the dismissal of the bill and the recovery of the "costs."

Substantially the same proposition is again asserted by the counsel at the foot of page 27 of their Argument. My distinguished opponents are as unfortunate in their understanding of the law in this matter as they are in their version of some of the important facts of the case; for the Supreme Court of Illinois [whose interpretation of the laws of that State will be respected by this Court,] *have decided precisely the reverse* of what my opposing brothers thus assert to be the law. And such has been their holding for years upon the hearing of motions (such as my opponents think ought to be made, as appears at page 20 of their Argument,) to revive injunctions pending appeals in that Court; but these decisions, for some reason, did not find their way into the Reports, nor were any of them published until this last fall, when the Court, finding that their rulings in the matter were not known to all the Bar, took occasion to proclaim a formal opinion in writing upon the subject. This opinion was given at the September term, 1870, in the case of *Bressler et al* v. *McCune et al*, on a motion for an injunction, and will be found in the "*Chicago Legal News*" of November 5, 1870, on page 43. In the opinion the court say:

> " The rule on the question of injunctions on records in
> " this Court may be concisely stated thus :—In cases where
> " the Court below awards a *temporary injunction which is*
> " *contined to the final hearing, and is then dissolved and*
> " *the bill dismissed. and the party prays for and perfects*
> " *his appeal under the order of the Court*, SUCH APPEAL SUS-
> " PENDS THE DECREE DISSOLVING THE INJUNCTION, *and there-*
> *fore leaves it still in force.*" [This is precisely the case at
> bar—See Record, pp. 54 55, 43, and 45.] " if the injunc-
> " tion is dissolved by an interlocutory order, and the cause
> " afterwards proceeds to a final hearing, such appeal will
> " not revive the injunction."

The same rule is held in *Yocum* v. *Moore*, 4 Bibb. 221.

In respect to the case of the *Supervisors of Fulton County* v. *The Mississippi & Wabash R. R. Co. et al.*, appealed from the Circuit Court of Fulton County to the Supreme Court of Illinois, (Record, pp. 43, 45, 54 and 55: and 21st Ill. R. pp. 369-372, inclusive,)—in respect to this case, (and which involved these very bonds and coupons now in issue,) my opponents, at page 19 of their printed Argument, say that: —

> " It was not a case where the law allowed an appeal,
> " there being no decree for money, exclusive of costs, and
> " no franchise or freehold being involved."

The counsel then refers to " Gross' Statutes of 1868, 513, § 58," and to "4 Gilman, 353."—The Statute referred to, was enacted in 1845, under the Constitution of 1818, (See Ills. R. S. of 1845, page 420, § 47,) and the decision referred to, was based on that Statute; and if my distinguished friends who represent the Plaintiff in Error had not been asleep as the Rip van Winkle for more than twenty years, they *ought* to have known that in the year of our Lord 1848, a new Constitution was adopted in Illinois, Section 5 of Art. V. of which provides that:—

> " *The Supreme Court* may have original jurisdiction in " cases relative to the revenue," (and in other cases nam- "ed,) *and shall have appellate jurisdiction* IN ALL OTHER " CASES."

And if they will rub up their spectacles a little, and look at page 23 of the same Gross' Statutes of 1861, to which they refer, they will discover this constitutional provision of which they seem not to have heard. Or if they will examine the 3rd Edition of Gross' Statutes, (Edit. of 1869,) at page 516, they will find, in the *body* of the very section they refer to, that it was "changed by the Constitution of 1848, Art. V., § 5.

At page 21 of their Argument, my opponents urge that —

> " Appeals lie only from *final* decrees, and that a portion " only of this decree was such, dismissing the bill and for " costs."

The chancery proceeding was instituted to enjoin $60, 000, of bonds claimed but not issued, and to enjoin the transfer of the $15,000, in bonds delivered, (and most of which are in controversy in this suit,) and to set aside the subscription to said "Central Division" corporation, made by the Clerk, etc. Record 43, etc.: It was not until the *final* decree on the heading, dissolving the injunction and dismissing the bill, that an appeal was granted and perfected. (Record, pages 54 and 55.). The injunction was not dissolved by an interlocutory decree. It was the chief object of the bill, and was the most important matter affected by the decree " dissolving the injunction and dismissing the bill." And yet counsel don't think the dissolution of the injunction had any part or " portion " in the "final " decree. I notice, however, that they are careful not to give any "reasons for the faith that is in them " in this regard.

But the Supreme Court of Illinois in the case cites from the "*Chicago Legal News*" (*ante.*) settles all this matter, if there was ever anything about it that needed to be settled. That decision holds not only that an appeal lies in this precise case, but that the appeal carries with it the injunction, and " leaves it still in force."

And it follows, as a matter of course, that if the appeal " suspends the decree dissolving the injunction," the reversal of that decree by the Supreme Court (Record, page 55,) leaves the injunction in perpetual force.

And again.—The appeal was perfected in point of fact; the record went up to the Supreme Court; that tribunal retained and passed upon the case under the appeal; [and here I may say, in passing, that that high judicatory *probably* knew whether or not, under the laws of Illinois, they had jurisdiction of the proceeding on the appeal;] and it does not lie in the mouth of the plaintiff in error or of any one else to question the appeal *collaterally*, even if it was erroneously taken and retained ; and I am astonished that lawyers of the great learning and ability of my opponents should have undertaken it.

(4.). At page 19 of their Argument plaintiff's counsel say that:—

"In the Supreme Court the decree below was reversed, "and from that time, January, 1859, the County *has abandoned the suit.*"

Where do counsel find this it? They will search the Records in vain for any such information. And the assertion is not true in point of fact. For the purposes of the present discussion, it is enough for me to reiterate what is above stated, that *the reversal of the decree of the Circuit Court leaves the injunction in perpetual force.*

III.

Irregularities.

1. The condition on which the subscription was to be made, even for the capital stock of the original company, (*i. e.*, that $700,000, should be first subscribed and five per cent paid in—Record, p. 28,) was never complied with. (Record, p. 91.) This was a condition precedent, and the county had a right to impose it, as much so as an individual would have. See, as to this right:

Barry v. *Merchant's Exchange Co.*, 1 Sand. C. R., 280.

North Hemstead v. *Hempstead*, 2 Wend. 134.

De Witt v. *San Francisco*, 2 Cal. 289.
Gillispie v. *Grove*, 3 Wend. 370.
Justices Clark Co. v. *P. W. & R. R. Turnpike Co.*, 11 B. Monroe, 143.

And unless this condition precedent was complied with, the original M. & W. R. R. Co. even, was not entitled to the bonds, under any circumstances, even after subscription.

Redfield on Railways, 95, 96, and notes.
Fisher v. *Evans. & Crawf. R. R. Co.*, 7 Porter, (Ind.) 407.

Private subscriptions to a large amount were canceled by the original Company (Record, pp. 38-9,) and all subscriptions in Fulton County (including the County $75,000, if by any contortion of the facts or law that can be treated as having been subscribed), were in effect released by the Board of Directors of that Company. (See Record, p. 35; also Stipp's testimony, Record, p. 88.) The acts of the Board of Directors "releasing subscriptions," &c., were "legalized and made valid" by the 10th section of the act of 1859, accepted by the Company. (Record, pp. 27 and 44.) The vote of the County in favor of taking the $75,000 stock in the M. & W. R. R. Co. was had in *November*, 1853. (Record, pp. 28 and 31.) In *December following* $99,000 in private subscriptions were released on a single occasion. (Record, pp. 38 and 39.) This fact alone released the County from all obligations to subscribe (if any before existed) under the vote, and would have worked a discharge from the subscription had it been made.

2. *No subscription was ever made* to, or for the capital stock of the original company (M. & W. R. R. Co.,) in

favor of which the vote was had; nor were any certificates of stock ever delivered to the County. As to the non-issue of certificates of stock, see admission in the body of Dyckes' testimony (Record, p. 87.)

☞ Bonds issued by county officers are not binding, unless the subscription authorized be first actually made, unless in hands of innocent purchasers; and not even then, where the law prohibits subscription (as in this case,) save on conditions not fulfilled. ["No subscription shall "be made," * * "or bonds issued," * * "unless," &c., says the law of 1849.]

Aspinwall v. *Commissioners Daviess Co.*, 22 Howard, 374, &c.

The People v. *County of Tazewell*, 22 Ill., 156; 12 B. Monroe, 144.

In the Tazewell County case cited, the Supreme Court of Illinois treat the point with such clearness and force, that I beg leave to present an extract:

> "Until the county or city has subscribed, there is no
> " privity between the road and the county or city. *It is*
> " *the contract of subscription* which compels the subscriber,
> " for stock, to pay his money, and the company to issue to
> " him shares of their stock. Until the county subscribe
> " for shares of their stock, the company hold no obligation
> " on the county, and cannot, by tendering shares of stock,
> " compel them to subscribe, or to issue bonds, nor have
> " they any power to compel the road to issue to them
> " shares of their stock. Until the subscription is made, it
> " is entirely at the option of the road whether they will
> " permit such subscription. Before the subscription is
> " made, no obligation exists between the parties. *Nor*
> " *can the vote be treated as an agreement between the county*
> " *and the road*, beyond what the law has peremptorily re-
> " required to be performed. ***When the vote was taken and***
> " ***resulted in favor of subscription, it only amounted to a***

“ *delegation of power to the supervisors to make the contract of subscription as the law then authorized them to do. The Company was no party to this vote, and has no more right to insist upon the execution of the power thus delegated, than it would have been in case an individual were to authorize an agent to subscribe for stock in the road, and who should refuse to exercise his power for his principal.*”

Of course, this point is made, as are many others, to meet the hypothesis of my able opponents, that the bonds in controversy were really issued to, and in pursuance of the vote in favor of the original M. & W. R. R. Co., which hypothesis, however, I deny. But, even if the Clerk *intended* to issue the bonds in pursuance of that vote, my answer is, first, *that he did not do it*, (the subscription and issue both having been to the “Central Division” company, another and different corporation, as the Supreme Court of Illinois have decided, as before suggested, as to these very bonds—21st Ill., 272, and *ante*); and secondly, that *had* the bonds issued to the original company, yet even *that* company was not entitled to them, and hence they cannot be enforced on behalf of this plaintiff, who takes no greater rights than they. The “Central Division” corporation never succeeded to the rights of the original company, as the Illinois Supreme Court, in construing the statutes in question, says, (21st Ill., 372); nor did the original organization ever succeed to the rights of the “Central Division,” or *sixty mile* affair. After the rickety old mother had quietly reposed within the gates of death from June, 1856, to November, 1858, under the inscription “*requiescat in pase*,” while the saucy little offspring (“Central Division”) was playing pranks and squandering largely of the estate, lo! of a sudden, the old woman leaps from the grave, and, on the 11th of November of the latter year, by a unique specimen of "ground and lofty tumb-"ling," endorses the child and its pranks, but repudiates and disowns the father (act of 1857), without whose offices the young sprout "Central" never had been "conceived "and born in sin." (Record, pp. 39, 36, 37 and 38.) But, at most, this was merely fondling the bastard and repudiating the only source (Act of 1857) through which, *under any possibility*, these bonds in controversy could have gained vitality; for, be it remembered, the subscription was made and the bonds issued to the offspring of that Act; and the repudiation of the Act, as having any legitimate connection with the old company, (and through which connection *alone* could any "succession of rights" —flow—if at all)—the repudiation of the Act, I say, gives all the more point and prominence to the separate corporate life of the "Central Division" affair. [See 21st Ill., 372.]

☞ (3.) The submission to the vote of the people of the Mississippi and Wabash R. R., and the Petersburg and Springfield R. R. projects coupled together,—this pro-"position to vote on the two roads at the same time, was "not authorized by the law, and is a fraud on the people," to use the language of the Supreme Court of Illinois in respect to the order for the vote in this case upon the question of taking stock in the original or M. & W. R. R. Co. And for this reason, even had the subscription and bonds been to the original company, they would have been "un-"authorized by the Act," and the bonds could not by them have been enforced, and probably not even by an innocent purchaser. *Supervisors Fulton Co.* v. *M. & W. R. R. Co. et al*, 21st Ill., 372 74, inclusive. See also *McMillan et al* v. *Lee County*, 3 Clarke (Iowa,) 311.

(4.) The change in the enterprise, under the Act of 1857, was so radical and fundamental, as that the County would have been released, even had her subscription been made to the stock of the M. & W. R. R. Co., and had the Company accepted the amendment to its charter. It was under that amendment that the "Central Division" corporation got the bonds, and claimed to have succeeded to the rights of the original company, within the sixty mile district. The line of the original company was 230 miles long, and the stock would have been valuable, while the line of the "Central Division" corporation was only about sixty miles long, and its stock was and would have continued worthless. The Supreme Court of Illinois decided in the case concerning this matter (21st Ill., 371,) that if the amendment of 1857 be treated as accepted; even then "the stockhoders would not be liable."

The relation between a R. R. stockholder and the Company is one of contract, and any legislative enactment, which, without the assent of the stockholder, authorizes a material change in the powers or purposes of the corporation, not auxiliary to its original object, is of no binding force, and discharges the stockholder, if accepted or acted upon by the Company.

Sparrow v. *Evansville and Crawfordsville R. R. Co*, 7 Ind., (Porter,) 369.
Carlisle v. *Terre Haute and Richmond R. R. Co.*, 6 Ind., (Porter,) 317.

A contract made under an existing law must be presumed to have been made with reference to it, and cannot, therefore, be impaired by a subsequent legislative act.

The law existing at the time the contract was made enters into and is a part of the contract itself.

Blanchard v. *Russell*, 13 Mass., 16.
Sparrow v. *E. & C. R. R. Co.*, 7 Ind. 373.

"There can be no doubt that subscribers to the stock of a railway company, are released from their obligation to past calls, by a *fundamental* alteration of their charter." (Redfield on Railways, 91, § 1.)

All the cases on this subject make the same distinction. If the alteration is *fundamental*, the stockholder who does not assent is discharged; if it is merely *auxiliary*, giving *additional* and *beneficial powers*, and the *amendment is accepted* by the directors or a majority of the stockholders, the subscribers to the stock are bound.

Middlesex Turnpike Co. v. *Locke*, 8 Mass. 268.
Same v. *same*, 10 Ibid, 438.
Hart. & N. H. R. R. Co. v. *Cresswell*, 5 Hill, 383.
Winter v. *Muscogee R. R. Co.*, 11 Geo. 438.
Stevens. v *Rut. & Bur. R. R. Co.* 1 Am. Law Reg. 145.
Redfield, 93, §1.
Barrett v. *A. & S. R. R. Co.* 13 Ill., 504.
P. & O. R. R. Co. v. *Elting*, 17 Ill., 429.
Sprague v. *Ill. River R. R. Co.*, 19 Ill., 174.
Ill. Riv. R. R. Co. v. *Zimmer*, 20 Ill., 654.
Pacific Railway v. *Hughes*, 22 Mo., 291.
Bell v. *Railway Co.*, 4 Wallace, 601.

"A road intended to secure the advantages of a *particular line of travel and transportation*, cannot be so "changed as to defeat that object. The corporation must "remain substantially the same, and be designed to accomplish the same general purposes, and subserve the same general interests." * * "*The alteration must be accepted by the managers of the Company before it becomes obligatory on the stockholders. And the latter will not even then be bound, if their interests are materially affected by the alteration.*"

Barrett v. *A. & S. R. R. Co.* 13 Ill. 504.

Where articles of association specified *the route* the road was to take, and that it was to pass through some portions of certain counties, and the road was so located as not to touch either of those counties, it was held that subscribers to the capital stock were released from their subscriptions.

Redfield, 95-96.
See also *Railsback* v. *Liberty & A. Turnpike Co.*, 2 Carter, 656.
And *Buffalo, Corning & N. Y. R. R. Co.* v. *Pottle*, 23 Barb., 21.

IV.

CONSOLIDATION.

(1.) How the consolidation of the M. & W. R. R. Co. with the T., P. & W. R. R. Co., within the last four or five years, and the building of a road by the consolidated organization through Fulton County, in 1868, to connect with an old road running eastward from Peoria—how this is to give life to dead bonds, issued by the Clerk of Fulton County, to *still another corporation*, in 1857, is a question that will worry the ingenuity of my learned opponents to solve. Still, they have taken the trouble to prove the consolidation by several witnesses, and in their Argument to make some use of the fact! Can it be *possible* that any lawyer has it in him to *imagine* that the Railroad Companies, any or all of them, can, by any act of their's, ratify, *for the County*, or infuse vitality into either void or voidable bonds? Bosh!

(2.) But had the subscription been made and the bonds issued to the original or M. & W. R. R. Co. before the consolidation, by the very fact of the consolidation, the county, not consenting thereto, would be discharged from the bonds, in case they were not in the hands of *bona fide* purchasers, inasmuch as the consolidated line does not run within 16 or 18 miles of Bloomington, Ill., a point made essential by the charter of the Company, in favor of which the people of the County voted. (Private Laws of Ill., of 1853, p. 73.) The line of the consolidated Company runs substantially on the route of the old Company through Fulton County, but not east of that County, though from Peoria, on the Illinois River, it runs parallel with the chartered line of the M. & W. R. R. Co. The charter specifies the route, and it is not followed. See Redfield, 95, 96; 2 Carter, 656; 23 Barb., 21, and other cases cited under the last heading. "The law existing at the time "the contract was made enters into and is a part of the "contract itself." 13 Mass., 16.

One of the very objects of securing the construction of the M. & W. R. R.—that is to have a *competing* road was defeated by the consolidation.

V.

RATIFICATION.

(1.) The settlement with Judge HIGBEE was the compromise of a pending difference and threatened suit, and the resolution, authorizing the payment to him of bond 15 and coupons, on his delivering up the same, and also bond 20 and coupons, expressly protested against liability either on these bonds or the others issued to the "Central Division" Company, and disclaimed any recognition of the same, and declared that the payment of bond 15 and its coupons (transferred to BUELL before the commencement of this injunction suit by the county—see stipulation, Record p. 44,) was only to compromise the pending difficulty. Judge HIGBEE, it will be seen, took 50 cents on the dollar for his bonds and coupons, in the compromise. I need not cite authorities to show that this *compromise* is neither an estoppel nor ratification.

(2.) The Board of Supervisors, at the September session, 1866, on the report of a committee recommending that action, voted one afternoon in favor of paying bonds 2 and 6 (the PERKIN's bonds) with their coupons, (also transferred to BUELL before the injunction suit,) but, on further reflection, *re-considered the vote the next morning* and refused to pay them. Not much ratification even of these two bonds, and which are not in suit!

(3.) The payment of interest *by the County Treasurer* on bonds 1, 2, 5, 6, 7, 8 and 15, July, 1858, and on bond 15 in 1859, *was never reported to, or recognized by the Board of Supervisors*, as I think the proof affirmatively shows. At all events, it nowhere appears in evidence that these payments *were* ever known to, or recognized by the Board. These are the bonds that were transferred by the "Central Division" officers to Buell before the injunction suit, (Record, p. 44,) and the Treasurer probably paid the interest coupons on them all for the first year, and on bond 15 for the second year, under a misapprehension that the County was liable on those bonds, under the circumstances; and the Board, had it seen fit, might have authorized or ratified such payments, under the like misapprehension, without any ratification of the bonds. Had they re-imbursed the Treasurer, knowing of the payments, their action would have been susceptible of the further explanation of willingness to save that officer from loss, without any intent to approve the payments or adopt the bonds; and hence, that action would have amounted to no ratification, as will be shown in what follows, even if the Board had the *power*, under any circumstances, to ratify the bonds, which they *had not*. But as the case stands, the *Treasurer* alone is responsible for the interest payments made, and the payments by that officer were not a ratification of the bonds; nor was it in his power to ratify them.

Delafield v. *State of Illinois*, 2 Hill, 175.
People v. *Phœnix Bank*, 24 Wend, 431.

(4.) But if the public agents of the county had the power to ratify the bonds at all, and if what is proven to have been done, could be treated as sufficient to adopt or ratify any portion of them, it could *only* be as to *that portion* on which the Treasurer paid interest—namely, those transferred by the "Central Division" before the injunction suit; only those numbered 1, 5 and 7 of which are embodied in this suit. Notwithstanding the vote in favor of $75,000, the Board of Supervisors *were at liberty*, nevertheless, (if the conditions precedent were first complied with,) *to subscribe for only one or more shares*, at their pleasure. The authority to subscribe being first acquired by the public agents, it then becomes *a matter purely of discretion with them whether "to subscribe all or any part of the amount authorized."* It is so expressly held in *The People, &c.*, v. *Tazewell Co.*, 22d Ill., 155, and *ante.* And it follows, that if the Board can exercise a discretion *as to the amount to subscribe*, within the sum authorized, they have also the same discretion *as to the amount to ratify*, if ratify they can at all.

(5.) However, neither the Board of Supervisors themselves, nor the Clerk, were competent to make the contract with, or issue the bonds to the "Central Division" corporation; and the subscription was made and the bonds issued by the Clerk, to that corporation, in direct violation of law—[" No subscription shall be made" * * "or bonds issued, by any county" * * "unless," &c.]—and hence *the Board could not ratify the contract or the bonds, if they would.* In support of this position, I refer your Honors to the following authorities:

> " *Ratification is inoperative if the party attempted to*
> " *be charged was not competent to make the contract in*
> " *question when the same was made*, nor when the supposed
> " acts of ratification were performed, *or if the contract was*
> " *illegal*, immoral, or against public policy."

Supervisors v. *Schenck*, 5 Wallace, 781, &c.
Hoyt v. *Thompson*, 19 N. Y., 218.
Marshall Co. v. *Cook*, 38 Ill., 58.
Clark v. *Hancock Co.*, 27 Ill., 310.

"The ratification may be by express consent, or by acts "and conduct of the PRINCIPAL *inconsistent with any other "hypothesis than that he approved and intended to adopt* "what had been done in his name."

Supervisors v. *Schenck*, 5 Wallace, 782.

See also page 781, as to "full knowledge of all the circumstances" being essential.

Now, neither the principal nor the agents, (the Board of Supervisors,) have done or permitted a single act, indicating any intention "to adopt" the bonds in controversy. But, who are the "*principals*" in this case? The *people of the County*, beyond question,—the *corporation*—not the Board of Supervisors. They are only the *agents*. "The "*corporation* consists of all the inhabitants within the corporate limits; they are the corporators."

Rogers v. *Burlington*, 3 Wallace, 668.

"The officers of the corporation, constituting its legisla- "tive body, are merely the public agents of the corpora- "tion."—*Ibid.*

In the case in 5th Wallace, above referred to, "*the cor- "poration* (the citizens of the County,) knew for many years of the acts of the Board of Supervisors in making the subscription, purchasing shares of stock, issuing the bonds, exchanging the securities, paying interest on the bonds, &c., and they, (the citizens of the County,) during all this time, paid taxes for the interest, and took no steps adverse to the bonds; and, by these various means, acquiesced in and ratified the bonds, &c. (See page 782.)

"Where the transaction is between individuals, subse- "quent assent and acquiescence would validate the con- "tract; but where the Grand Jury were constituted the "organ for the purpose of recommending a subscription "to be made by the County Commissioners, the Commis-

"sioners *having no authority to make* a subscription, *except*
"*on that recommendation*, will have no authority to *ratify*
"an *unauthorized one*, but that can be done *by the Grand*
"*Jury alone*."

Mercer Co. v. *Pitts. & Erie R. R. Co.*, 27 Penn., 389.

I need not stop to apply these authorities to the claim of ratification set up in this case, without as much as a shadow of a basis of the claim. They come with crushing force, and my learned brothers will not venture on any attempt to answer them. "It is hard to kick against the pricks!"

VI.

SPECIFIC REPLY TO CERTAIN PORTIONS OF ARGUMENT FOR PLAINTIFF IN ERROR.

(1.) In speaking of the Act of 1857 under which the "Central Division" Company was organized and operated, the Argument for plaintiff in Error, at page 7 has it that:

"This Act was obtained *to facilitate the construction of the road*."

And the same idea is several times put forward in that paper. The "road" referred to was the Mississippi and Wabash Railroad,—230 miles long and running through the entire State from west to east—and *not* the little *sixty mile* "Central Division" concern. Unfortunately for this "*facilitating*" theory, the very *first* section of the Act itself declares *what* the intention was to "facilitate." (Rec. page 7.) And my opponents, as if to show flatly that they can contradict themselves, only a few lines before they make the above assertion, (page 6 of their Arg't) quote from that section the words that declare the object of the Act to be:

> "For the purpose of *facilitating* and *more effectually securing* the early construction of CERTAIN PORTIONS *of the* Mississippi and Wabash Railroad *line*."

Ah-ah! "CERTAIN PORTIONS" of the road! *Not* the 230 mile road in whose capital stock the people of Fulton County were willing to invest, but "*certain portions* of the line!" Opposing counsel say it was "to facilitate the construction of *the road*." The *law* they quote declares in their teeth that the object was to facilitate the construction of "certain *portions* of the road! But the people of Fulton County never *voted* to facilitate "*portions*!" They wanted a road that would take them and their produce out eastward, and connect with other roads reaching on to the seaboard; and they desire also a road that would tap the "Father of the Waters" at the western terminus—not a little 60 mile Road, confined almost entirely to the limits of the County. And they wanted moreover to cheapen transportation by means of competing lines of road—not to swell freights and fares by sinking $75,000 in a little "portion" concern that would be sure to be swallowed down into the "consolidation" stomach of a competing road.

And herein is manifest the real cause of the present controversy. It is apparent from this Act of 1857 that the original project of the M. and W. R. R. through the State had been *abandoned* when the Act was passsd ; else, why provide for building "certain *portions*" of the original line? Even my adroit opponents substantially admit this, when on page 24 of their Argument, they say: "It was "*notorious*, and well understood by the Board, as shown "by their order of March 5, 1857, *that the old Board of the* "*M. and W. R. R. Co.* HAD NO ACTIVE VITALITY." And that the original road *was in truth abandoned* in June or July, 1856, is shown by the testimony of STIPP, BABCOCK and others, at pages 82, 83 and 91 of the Record and by the stipulation, at page 39, from which paper it appears that there was no meeting of the Board of Directors of the original Company from June 1856 'till November 1858. From the latter date up to April 1859, the original Company had two or three twitches of the nerves, (Rec. pp. 36-38,) and then laid in a trance until pounced upon and swallowed by a "consolidation" buzzard in 1865. (Rec. p. 84.)

At the very next session of the Legislature after this abandonment, (and in February, 1857, the charter was procured for three little or "*certain portion*" corporations, and the "Central Division" affair sprung at once into life, and, by resorting to the tactics of the toad in the fable, made an unsuspecting *Clerk* of Fulton County believe that IT was the real 230 mile giant, instead of quite a different being and only a little 60 mile dwarf, and thus succeeded in getting hold of $15,000 in bonds, most of which are in controversy in this suit. Not taking warning from the terrible end the hero of the fable was brought to by its imprudences, the little dwarf kept on inflating itself until early in 1859, it also exploded.

This statement shows, in a nutshell, that the *original road* being regarded as abandoned, it was intended to secure the construction of "certain portions" of the line or little pieces of road, to accommodate local and speculating interests, by means of three small corporations, (the "Central Division" being one,) each of which, by the terms of the Act of 1857, where to be wholly independent of each other. In this scheme the people of Fulton County had no part or lot, and they gave no authority to their agents to have anything to do with it. See in this connection, *Sparrow* v. *Evansville and Crawfordsville R. R. Co.*, 7 Ind., (Porter,) 369; and *Carlisle* v. *I. H. & R. R. Co.*, 6 Ind., (Porter,) 317; and particularly *Blanchard* v. *Russell*, 13 Mass., 16.

☞Another important fact in this connection is, that *a few months after the M & W. R. R. project had been abandoned, the citizens of Fulton County* turned their attention to other roads, and, *in April*, 1857, *voted to take* $200,000 *in this stock*, $100,000 in each road—undoubtedly supposing, as they had every reason to do, that the M. & W. R. R. would never be heard of again, and that the $75,000 voted to that Company would never be asked for. They wanted Railroad falicities, and hence looked to other projects after the M. & W. R. R. had been given up.

☞1. At pages 7 and 8 of their Argument, my opponents *pretend* to give the contents of an order passed by the Board of Supervisors, March 5, 1857, and the purpose evidently is to leave the impression in the minds of the members of this Court, that the Board directed the bonds to be issued to the "Central Division" Company. At the top of page 8, they close their quotation from the order with the words, "*the bonds of the County shall be issued*," italicizing them and cutting the sentence in two in the middle, and in which sentence there is not so much as a comma to separate the words thus quoted from the *emphatic* and *important* part of the order that immediately follows. The words thus dropped and hid are these: "*in accordance with the provisions of the* ORIGINAL ORDER." Thus the order recites that (certain conditions being complied with):—

> "The bonds of the County shall be issued *in accord-*
> " *ance with the provisions of the* ORIGINAL ORDER." (Rec.
> " page 31.)

The pith of the words thus dropped by my opponents will be seen by referring to the "original order" on pp. 27 and 28 of the Record, (*i. e.* the order of Sept. 1853,) which requires the bonds on the conditions named, *to be issued to the Mississippi and Wabash Railroad Company.*

Of course, the distinguished counsel did'nt *intend* to mislead! That they meant to be entirely *fair* is all the more apparent from the fact that when they dropped the important words indicated, they were careful not to make any reference to the Record!

> (3.) "The stockholders, of which the *County* is one,
> " *elected commissioners* for this division, under the act, and
> " the enterprise proceeded, and the bonds were issued ac-
> " cordingly. The County is, therefore, estopped from com-
> " plaint about what was done for its benefit, *with its*
> " *participation* and in pursuance of its record orders."
> (Plaintiff's Argument, p. 15.)
>
> "*The County exercised the rights of a Stockholder in the*
> " *Railroad.*" (Plaintiff's Argument, p. 24.)

The County *never took part* either in the election of Commissioners, or in *any other* corporate act of either the "Central Division" corporation, or of the M. & W. R. R. Co.; *nor did the County ever, in a single instance,* "*exer-*

" *cise the rights of a stockholder*" *in either one of those Railroad organizateons.* If counsel search the record until dooms-day they will not find *one word* to sustain their assertions to the contrary!

(4.) In discussing the amendment of February, 1857, and the vote to the original Company, plaintiff's counsel, at page 16 of their Argument, say:

> " By no logic could the amendment operate to avoid the " *duty* of the County, arising under the Statute of 1849, " and the vote of the County in favor of taking the stock " to pay for it. The vote conferred no mere discretionary " power on the County Board, but imposed a duty to make " it effectual by taking the stock and issuing the bonds, " which a court would enforce by *mandamus.* And this " duty, within the meaning of the amendment, was as " much a contract as an actual subscription would be. It " was a *rights* arising out of the Statute and vote, imposing " on the Board the ministerial duty of taking the stock and " paying for it in County bonds."

Unfortunately for this theory of my opponents, the Supreme Court of Illinois have decided directly the other way! In *The People* v. *County of Tazewell*, 22 Ill., 156, that Court says, that " until the County or City has *sub-* " *scribed, there is no privity between the Road and the* " *County or City.*" * * " Until the *subscription* is " made, *it is entirely at the option of the road whether they* " *will permit such subscription.*" * * " *Nor can the* " *vote be treated as an agreement between the County and* " *the Road,* beyond what the law has peremptorily re- " quired to be performed. *When the vote was taken and* " *resulted in favor of subscription, it only amounted to a* " *delegation of power to the Supervisors to make the con-* " *tract of svbscription* as the law then authorized them to " do." *The Company was no party to the vote, and has no*

" more right to insist upon the execution of the power thus " delegated than it would have been in case an individual " were to authorize an agent to subscribe for stock in a road, " and who should refuse to exercise his power for his principal."

This is solid sense, which cannot be overcome; and it is, in substance, the same doctrine held by this Court in *Aspinwall* v. *Commissioners Daviess Co.*, 22 Howard, 374, &c.

(5.) " If necessary to sustain these bonds, made and received in *good faith* and for *value*, the law will regard " the words 'Central Division' in them, and then the " payee named would be the corporate name of the Company at the time of the vote." (Plaintiff's Argument, p. 17.)

In "*good faith* and for *value*," INDEED! This "*good faith* and *for value*" business is disposed of in former portions of this Argument, under the two headings of " The " Plaintiff not an Innocent Purchaser;" under the first of these headings the facts being given, and under the second the law being discussed.

But counsel inform us that " the law will reject the " words " Central Division !" " and make the bonds run to another corporation! Who gave the counsel this information as to what " the law " will do? The logic of this grave proposition is, that if some rascal forges a note on me, in his own favor, and transfers it to somebody else, then, " if necessary to sustain " the note " the law " will reject the rascal's name and put in that of some one else, to whom years and years ago I may have authorized my agent to promise on my behalf to pay money on the fulfillment of conditions never fulfilled! And this, although the agent never made the promise! For, bear in mind, there was never any subscription made, on behalf of the County, on the books of the original or M. & W. R. R. Co.!

(6.) The question of the effect of the appeal to the Illinois Supreme Court from the decree of the Circuit Court dissolving the injunction, &c., discussed by the plaintiff's counsel at pages 18, 19, 20 and 21 of their Argument, and again referred to at page 27, has been investigated in a former part of this Argument. (See 3d sub-division of the second heading, "Plaintiff not an Innocent Purchaser," in the discussion of the "Law applied to the Facts."

(7.) Speaking of the issue of the bonds in controversy, September 1st, 1857, &c, my opponents, at pages 21 and 22 of their Argument, say:

"The Board, individually and collectively, evidently "knew the fact, and made no objection until the institu-"tion of suit in October following."

October following! That *was* a long time to wait indeed! A few days over a month! There is no evidence, however, that the Board collectively knew anything about it, at the September session 1857, only that some of the members knew of it; but there *is* evidence that the Board, at that meeting, appointed agents "to represent the in-"terests of the County in the 'M. & W. R. R. Co,'" and other companies, and to "do all such things as" * * "the interests of the County required," &c. (Record, p. 48.) And there is evidence, also, that in about three weeks thereafter one of the agents caused suit to be brought on behalf of the County in respect to these bonds and to enjoin others, &c. (Record, pp. 43, 44, 46, 47 and 66.) Wonder if it ever occurred to counsel that three weeks would not be a very long time in which to gather information through an agent, and cause suit to be brought in a matter involving $75,000! This three weeks delay is claimed by plaintiff's counsel as evidence of "ratification." What a "ratification!"

(8.) "Nor until September, 1858, did the Board question the propriety of the amendment of 1857, or rescind "its orders authorizing the clerk to do as he did." (Plaintiff's Argument, p. 22.)

Nor did the Board *recognize* "the propriety of the "amendment." But they *did* question it in the suit brought October 9, 1857.

The Board never authorized "the clerk to do as he did" —*i. e.* issue bonds to the "Central Division" affair.

(9.) Reference is made by my opposing brothers, on pages 22 and 23 of their Argument, and elsewhere in the same, to steps taken by the Board to provide for interest on County bonds. I reply, that at no time did the Board ever provide for any interest on these "Central Division" bonds; and that the provision which was made for interest was with reference to bonds of the County issued to two other Railroad Companies—$300,000 in all—and which were issued from 1857 to 1859, the subscription which they were issued to pay having been made in 1855, 1857 and 1859. The last subscriptions ($200,000) were voted in April, 1857, a few months *after* the M. & W. R. R. project had been abandoned. (Record, p. 39.)

(10.) The report of the committee, referred to on page 23 of Plaintiff's Argument, "that $350 was needed to pay "interest on $4,500" of bonds issued to "M. & W. R. R. "Co.,"—(see Record, p. 50)—*not* "these bonds," as counsel say, "disposed of by said Company before any injunc-

"tion writ was served" (Record, p. 50); this *report* of the "committee" *was never adopted, or in any way acted upon by the Board.*

(11.) Two other matters referred to by my opposing friends, at pages 23 and 24 of their Argument, and which, as stated, are calculated to mislead—one at the foot of page 23, commencing with "September, 1864," and the other at the top of page 24, commencing with "September, 1866," have already been fully met and replied to under the "V," the heading of my "Statement of Facts, &c.," title "Ratification."

☞ (12.) My opponents seem to think (see p. 24 of their Argument) that the testimony of DYCKES and STIPP, two members of the Board of Supervisors, only shows that "*they* did not know of the payment of interest on the bonds." Their testimony, together with that of PIERSOL and an admission in the Record, conclusively shows that the *Board of Supervisors* NEVER knew of the payment of interest on any of the Central Division bonds. DYCKES was a supervisor from 1858 to 1861, and clerk of the Board from 1861 up to the trial; STIPP was a member of the Board from 1861 to 1863, and attended all the meetings; and PIERSOL was clerk from 1853 to 1861. *Neither of them ever knew of the finance committee making any reports, except in writing, as to the Treasurer's accounts; and the records of the Board show no reference whatever to the payment of interest by the Treasurer on any of the "Central Division bonds.* DYCKES examined the records with especial reference to this point; and it was *admitted* on the trial (Record, p. 90) "that *the records of the Board of Supervisors* of Fulton County *show no action by the Board touching the payment of interest on said bonds in contro-*

" *versy*, except as otherwise may appear " in the Record, " if otherwise anything does so appear." For the testi- " mony of PIERSOL, DYCKES and STIPP, as to this matter, see Record, pp. 85, 86, 87 and 88.

(13.) " The County Agents, in discharging their duties " imposed upon them by order of the County Board, " *doubtless cast the County vote for these Commissioners*," (*i. e.* of the " Central Division.")

" The County Agents " " doubtless " DID NO SUCH THING! *Not a particle of evidence* in the Record goes to show that they did any such thing; and since my opponents are so ready to give in their unsworn testimony, outside of the Record, as to what the Agents " *doubtless* " did, I must be allowed to give mine, that it is a notorious fact that the agents never had anything to do with or about these " Central Division " Commissioners, or *this* " Central " Division " affair, except to institute suit and successfully to resist all their attempts to grab $60,000 more in bonds.

(14.) " The payment of interest on some of the bonds " goes to the whole." * * " *All or none are obligations* " *of the County*." (Plaintiff's Argument, p. 25.)

I agree that "all or none are obligations of the County," but deny that "payment of interest on some of the bonds " goes to the whole," even if the payment had been made or recognized by the County, which was not. Even when the Board of Supervisors are authorized *by a vote* of the County to subscribe for capital stock, *it is a matter purely of discretion with them, whether* " *to subscribe all or any* " *part of the amount*." *After the vote* of authority *they may subscribe for only one or more shares within the amount authorized*, at their pleasure. This is so expressly held, under the laws of Illinois, by the Supreme Court of that

State, in *The People* v. *Tazewell Co*, 22 Ill., 155, and preceding pages. And it follows, *a priori*, that if they may exercise their discretion *as to how many shares to subscribe after authority given*, they may exercise the like discretion as to *what bonds to ratify where no authority was* voted, if indeed in such case *they can ratify at all*, *which I deny*.

(15.) "*Adoption of report that others of these bonds were "a value due by the County" and " ought to be paid.*" Plff's Arg't p. 26.

Why didn't the counsel tell the *whole* truth? The Rec. (p. 54,) shows that *the vote referred to was*, *on the very next morning*, " *reconsidered*," *and that*, thereupon, on further consideration of the report, *the Board of Supervisors*, " *on* "*final vote*, *refused to pay said bonds or coupons*." **Shope**'s deposition (p. 71 Rec.) shows the same thing more fully, and, that " *the vote by which the report* of said " finance committee, with reference to said bonds and " coupons *had been concurred in*," *was* " *reconsidered*," and that thereupon the Board " refused to pay or allow said bonds and coupons." Yet, in the face of all this, the distinguished counsel make the assertion quoted, without any word of qualification! Is this *fair* and *honorable*?

(16.) At page 26, and at several other places in their Argument, the opposing counsel affect to treat the commissioners of the said " Central Division " Company as "*agents*" of the original or M. & W. R. R Corporation. But that don't make out that they *were* such agents. The *Supreme Court of Illinois* in construing the Act of Feb. 1857, under which the " Central Division " concern sprung into being, hold that: " We cannot but consider, for the " reasons given, *this Company* (*the Central Division*) *thus* "*acting, as another and different Company from the one* "*to which the subscription was made*," (VOTED,) and that these "commissioners" are the *Managers* or *Directors* of such other and different Company." (See *Supervisors Fulton Co.* v. *M. & W. R. R. Co. et al*, 21 Ill. 372.) This don't look much as if the Commissioners were "Agents" of the original Corporation!

(17.) "The Divisions were procured by the subscribers" * * "*to obtain Railroad facilities.*" Plff.'s Arg't page 26.

Where did counsel learn that the "Divisions were pro- "cured by the subscribers"?

The people of Fulton County, after the abandonment of the M. & W. Road, turned their attention in other directions "to obtain Railroad facilities," and *obtained them.* (See Record, pp. 39 and 40.)

(18.) "The subscription and bonds went to the same enterprise, and substantially to the M. & W. R. R. Co." (Plff.'s Arg't, pp. 26 and 27.)

"Same enterprise!" *Bosh!* "Substantially to the M. & W. R. R. Co."! They "substantially" didn't do any such thing!

(19.) "Suppose these several purchasers did live in Fulton County, there is no proof they knew of any irregularity in anything done or omitted." "That Buel *lived* in the County is not sufficient even to charge him with notice, in fact, of the suit." (Plff.'s Arg't, p. 27.)

The Supreme Court of Illinois says, that *the citizens of a municipality, as a general rule, are chargeable with notice of all defects in exercising the power granted to the municipal authorities.* (See *Marshall Co.* v. *Cook*, 38 Ill. 54.) In support of the same doctrine I refer to the long list of authorities given in the 2nd subdivision of the heading, "Plaintiff Not an Innocent Purchaser," *ante*, in the discussion of the "Law applied to the Facts." And again, there can be no *innocent purchasers of void bonds.*

☞ Whether THOMPSON and BUEL were "innocent purchaser" or not, *the plaintiff certainly* WAS NOT. See THOMPSON's evidence, at page 79, 80 and 81 of the Record. See also discussion, *ante*, as to effect of *lis pendens* and the *appeal* in the 2d and 3d subdivisions of the heading above referred to.

(20.) "The whole proceeding" (the injunction suit) is virtually abandoned by the County, by non-action in the matter of the suit from the reversal in 1859." (Plff.'s Arg't, p. 28.)

Not at all. I have shown in the 3d and 4th subdivisions of the "II" heading of the discussion of the "Law applied to the Facts" in this case, that the appeal carried the injunction with it, and that the reversal of the decree of the Circuit Court left the injunction in full force. This being so, the injunction is still operative. Suppose nothing has been done in the case since that reversal, the suit is not thereby abandoned, except in the imagination of the counsel.

(21.) "If any question is raised as to the purchase of " the bonds by the plaintiff, we refer the Court to *New* " *Kirk* v. *Cone*, 18 Ill., 449, 451, to 455, a case decided " upon the Statutes of this State. The plaintiff was the " legal holder of the bonds." (Plff's Arg., p. 28.)

The case here referred to holds simply that a contract between an attorney and his client, that the former shall render professional services for a contingent fee, is not tainted with the offence of champerty or maintenance! What that has to do with this case is beyond my comprehension; unless my opponents intend, by the reference, to give a sly intimation that the attorneys of record below are the real parties in interest in the bargain made with THOMPSON, (see Record, p. 79, &c.,) and, *in case* of recovery on these bonds, are to get all that will be left after THOMPSON shall receive his "66⅔ cents on the dollar *when collected*!" Nobody has talked about champerty in this case, that I know of. Nor does it follow, because there is no champerty about it, that the plaintiff is therefore an *innocent purchaser!*

(22.) "The County and the people have obtained what induced the vote." (Plff's Arg., p. 29.)

Not so! That is a very *great* stretch of imagination! What "induced the vote" was a projected line of road about 230 miles long, extending through the entire State, from Warsaw, on the Mississippi River, eastward, ("*by way of Bloomington, Ill.*" (Private Laws of Ill. of 1853, p. 73.) After the explosion of the "certain *portion*" corporation, a "consolidation" was effected under which the T. P. & W. R. R. Co. built "certain *portions*" of this line, but not any portion east of Fulton County, and whose old line of road ran, and now *runs*, 16 *or* 18 *miles* "*north of Bloomington.*" (Record, pp. 77 and 85.) This consolidation prevents all chance of competition by the M. & W. R. R. project; and its legal effect is to release all subscribers to the latter project from their subscriptions. When the *route* specified in a Railroad Charter is not followed, the law releases subscribers to the stock, not assenting, from their subscriptions.—(Redfield, 95, 96; 2 Carter, 656; 23 Barb., 21.) "The law existing at the time the contract "was made, enters into and is a part of the contract itself." 13 Mass., 16.

(23.) "From the course of defendant's counsel, it may be contended that the resolution of the Railroad Board of June, 1856, affects the question. (Record, p. 35.) If so, we answer, it names '*persons* residing in Fulton County, *having subscribed*,' and has no reference to the County; the County had not then subscribed." (Plaintiff's Argument, p. 29.)

Isn't a municipal corporation an artificial "*person*?" I had supposed that the law so regarded.

Counsel say, "the County had not then subscribed." That's true! And it is also true that *the County never has subscribed* to this day, to the stock of the Company whose Directors passed that resolution. But if the County could be treated as having subscribed, or as under any obligations, it would be discharged from all liability by that resolution, "the directors residing in said County" never having, from that date to this, "desired" the collection; (see Record, pp. 82 and 88,) and considering also the release of subscriptions to the amount of $99,000, the very next month after the County vote. (Record, 38–9.) "The "acts or proceedings of the Board of Directors" "releas- "ing subscriptions to the capital stock of said Company" were "legalized and made valid" by express provision of the 10th Section of the act of 1859, (Record, p. 27,) "im- "mediately accepted by said Company." (Record, p. 44.)

(24.) "Also that the directors, in 1853, ordered certain subscriptions cancelled. (Record, p. 39.) Our answer is, that this was done years before the Fulton County subscription was made." (Plaintiff's Argument, p. 29.)

Of course it was; for the Fulton County subscription never has been made; but it was not before the *vote*.

(25.). "Besides, the tenth section of the amendment to "the charter of the Company of 1859 expressly validates "the acts," (i. e., the release or cancellation of subscrip-

" tions.), " And by this the *County* was found." (Plain-
" tiff's Argument, page 30.)

" Bound " to what? The learned counsel know as well as any body else, that the Legislature cannot bind and loose *ad libitum.* They cannot, at the same breath, " bind " one subscriber and release another. Nor can a contract be impaired by a subsequent legislative act. If the *vote* could be treated as a contract to susbcribe (which it cannot,) then inasmuch as the vote was had in view of the organization, project and subscriptions existing at the time, the release of the subscriptions discharged the contract. The release of one maker of a promissory note, without the consent of the rest, releases all.

(26.). " And the order of the County Board of March 5,
" 1857, in effect, waived any supposed advantage on ac-
" count of them," (i. e. releases,) and anew directed the
" subscription and issue of the bonds." (Plaintiff's Arg't.
" page 30.)

Not stopping to discuss the power of the County Board without authority to " waive " any such " advantage " gained by the corporation of which they were only agents —I reply, first, that the Act of 1859, which was accepted by the Company, (Record, pp. 27 and 44,) had not then been passed, by which the releases embraced by the orders of December, 1853, and June, 1856, (Record, pp. 35, 38, 39,) were "legalized and made valid;" and, secondly, that the order of March 5, 1857, by the Supervisors, *did not* direct the " issue of the bonds " to the " Central Division " corporation, but, on the conditions named, ordered that they be " issued in accordance with the provisions of the *original order* "—that is, *to the M. & W. R R. Co.*— Recsrd, pp. 31 and 28.

(27.). The case of the *Supervisors of Fulton County* v.

The M. & W. R. R. Co., et al, 21 Ill. 338 to 374, involving the bonds in controversy, seems to annoy my learned opponents; and, at the foot of page 30 of their Argument, they seek to tip it overboard, in manner following:

> "It is evident from the opinion, the fact, in that record, "even as to the action of the County Board and the R. R. "Company, were very different from those appearing in "this."

"It is evident" that "the facts in that record were" not as strong in favor of the County as "those appearing "in this;" for then the act of 1859 had not been passed by the Legislature and accepted by the original Corporation, "repealing the act of 1857" (Record, p. 44,) and legalizing releases; nor had the old Company then repudiated said act of 1857 (Record, p. 38); nor had the "Central Division" affair then exploded as it afterwards did (Record, p. 44); nor had the monster "Consolidation" then swallowed up "all that was mortal" of the sickly concern, and made a radical change in the condition of things (Record, pp. 83, 84, 85); nor had the citizens of Fulton County then acquired other Railroad facilities, as they afterwards did (Record, p. 39); nor until that case was decided had the Supreme Court of Illinois, in passing upon the act of 1857 and usage under it, declared that the little dwarf "Central Division" was "*another and different* "*Company from the one to which the subscription was*" *voted*. But if this Court will take the trouble to examine the record in that case, they will find that everything was there that this Record contains which could have any possible bearing against the views presented in this Argument; and that upon the full Record before them, the Illinois Supreme Court, construing the statute of 1857 in connection with the facts, rendered a decision in effect, that if I authorize my agent to give a note in my name to John Smith for $75,000, *for a steamboat*, and he executes it to John Brown *for a little miserable canoe the note would be* void.

VII.

Conclusion.

In conclusion, I submit that if a complete, triumphant defence was *ever* made out, one is certainly established in the case at bar. Unless the Courts will protect municipal corporations against the unauthorized acts—acts without power—of those who happen to be their officials, even where the officer, in acting, had no wrongful intent, (as in this case,) I can see no reason why they will not also decline to give protection where the act was conceived in crime, as in the case of a feloneous issue and sale of bonds by a corporation officer. For, if the buyer has to look *only* to the *law* to ascertain whether, under any circumstances, the corporation has power to issue bonds, and to the *recitals of the bonds*, to learn whether or not the requisite circumstances have transpired, then there can be no escape in any case. [In the bonds in suit, however, there are no recitals of fact.] But there will be no such holding. *Nihil potest curiae nisi quod de jure potest.*

S. CORNING JUDD,

Attorney for Defendants in Error.